Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIRGINIA GASOLINE MARKETERS
& AUTOMOTIVE REPAIR ASSOCIATION, INC.,

Petitioner,

v.

MOBIL OIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fourth Circuit err in ruling that the Supremacy Clause of the United States Constitution and the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. 2801, *et seq.*, preempts certain provisions of the Code of Virginia regulating substantive provisions of petroleum franchise agreements as set forth in the Virginia Petroleum Products Franchise Act, Va. Code Ann. Section 59.1-21.8 through Section 59.1-21.16:2?

LIST OF PARTIES

The Petitioner, Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), is a trade association representing the interests of the service station dealers in the Commonwealth of Virginia. VGMARA intervened in a declaratory judgment action, brought in the United States District Court for the Eastern District of Virginia by Mobil Oil Corporation ("Mobil") against the Attorney General of the Commonwealth of Virginia (the "Attorney General"), seeking a declaration that certain provisions of the Virginia Petroleum Products Franchise Act were preempted by the Supremacy Clause of the United States Constitution and the Petroleum Marketing Practices Act, 15 U.S.C. 2801, *et seq.* ("PMPA").

Mobil is a multinational corporation, with its headquarters located in Fairfax, Virginia, engaged in the exploration, production, transportation ans sale, both at wholesale and retail, of gasoline and other petroleum products.

The Attorney General of the Commonwealth of Virginia is the chief law enforcement official in the Commonwealth of Virginia and is granted authority to enforce the provisions of the Virginia Petroleum Products Franchise Act.

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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1994

MOBIL OIL CORPORATION,

Plaintiff,

v.

ATTORNEY GENERAL OF
THE COMMONWEALTH OF VIRGINIA,

AND

VIRGINIA GASOLINE MARKETERS &
AUTOMOTIVE REPAIR ASSOCIATION, INC.,

Defendants.

PETITION FOR WRIT OF CERTIORARI

The Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered on July 19, 1994, and the denial of petition for rehearing with suggestion for rehearing en banc, entered on September 6, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reprinted as Appendix A. The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, is reprinted as Appendix B.

JURISDICTION

The Court of Appeals entered judgment on July 19, 1994 and denied a petition for rehearing on September 6, 1994. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

I. THE PETROLEUM MARKETING PRACTICES ACT

Section 2806(a) of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 *et seq.*, ("PMPA"), provides as follows:

> To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination . . . of any franchise or to the nonrenewal. . . of any such franchise relationship

unless such provision of such law or regulation is the same as the applicable provision of this title.

II. THE VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT

In 1990 the Virginia General Assembly enacted several amendments to the Virginia Petroleum Products Franchise Act. These amendments, referred to as "S.B. 235", provide as follows:

(a) *Section 59.1-21.11(1)*, providing that dealers "shall not be required" to keep retail outlets open for more than 16 hours a day, or six days per week ("the no minimum hours provision");

(b) *Section 59.1-21.11(6)*, requiring service station rental agreements to reflect "commercially fair and reasonable standards, uniformly applied to all similarly situated dealers of the same refiner in the same geographic area ("the rent control provision");

(c) *Section 59.1-21.11(4)*, barring petroleum refiners from limiting the number of stations operated by a franchisee-dealer ("the no maximum stations provision");

(d) *Section 59.1-21.11(6)*, requiring renewals of franchise agreements to be a period of at least three years ("the minimum renewal provision");

(e) *Section 59.1-21.16:2(C)*, precluding imposition of "purchase or sales quotas" in its leases and supply contracts ("the no quotas provision");

(f) *Section 59.1-21.11(7)*, forbidding credit card service fees to dealers "in excess of the customary fee charged by credit card services to retailers who authorize use of credit card purchases ("the maximum credit card provision"); and

(g) *Section 59.1-21.16:2(A)*, banning refiners from construction or operating with company personnel any new retail outlets in the Commonwealth, from July 1, 1990 through June 30, 1991, except on certain property purchased or under option to purchase by March 1, 1990.

Section 59.1-21.11(7) was subsequently amended and was no longer in effect at the time of the District Court's ruling. Section 59.1-21.16:2(A), by the time of the District Court's ruling, was no longer in effect due to its "sunset" provision.

STATEMENT OF THE CASE

VGMARA is the state trade association representing franchised service station dealers operating in Virginia. This case arose when Mobil filed a declaratory judgment action against the Attorney General of Virginia seeking a declaration that S.B. 235 is unconstitutional on several theories, *inter alia*, that it was preempted by the PMPA. VGMARA successfully intervened in the case in the District Court.

On June 30, 1990, one day before the effective date of S.B. 235, Mobil filed suit in the United States District Court for the Eastern District of Virginia, seeking a declaratory judgment that S.B. 235 was preempted by the Supremacy Clause of the United States Constitution, the

PMPA and the Lanham Act. Mobil also asserted violations of the Contract Clause and the Takings Clause to the United States and Virginia Constitutions as well as violation of the Special Laws provision of the Virginia Constitution.

The District Court granted Mobil's motion for summary judgment and ruled that S.B. 235 was preempted by the Supremacy Clause and Section 2806 of the PMPA. The Court further held that S.B. 235 was violative of the Special Laws provision of the Virginia Constitution. The Court granted the motion of the Attorney General for summary judgment with respect to all of the other counts in Mobil's complaint.

THE FOURTH CIRCUIT'S DECISION

In a published opinion, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court. The Court held that S.B. 235 related to termination and nonrenewal and effectively limited the criteria upon which franchisors could make decisions with respect to whether or not to terminate or continue the franchise relationship with the franchisee.

Chief Judge Ervin dissented. In his dissent, Judge Ervin was most concerned, not with what the majority opinion said, but rather what it suggested by implication. He felt that the majority went too far in finding that S.B. 235 "narrows the grounds for termination available to franchisors operating in Virginia." Under the majority's theory any changes in state law, not just those peculiar to the petroleum franchise scenario, that affect the substance of such franchise relationships must be struck down because they "narrow the grounds for termination."

REASONS FOR GRANTING THE PETITION

PMPA PREEMPTION.

A. Introduction.

Review by this Court is essential to resolve a recurring conflict among the Circuits on the issue of the preemption of state laws (both statutes and common law) by the provisions of Section 2806(a) of PMPA. The decision of the Fourth Circuit has far-reaching ramifications and has the effect of eroding protections otherwise deemed to have been provided in PMPA by Congress. Review is necessary to restore the proper balance of PMPA and to resolve the conflict on an issue that will most certainly reoccur.

B. The Scope of Preemption is Delineated by Congressional Intent.

The ultimate determinant on issues of preemption is congressional intent. The intent of Congress with respect to the preemptive scope of PMPA may be discerned by careful application of established analytic criteria.

C. *According to the Constitutional Standards, Federal Preemption Under the PMPA and the Supremacy Clause is Expressly Limited by the Language of 15 U.S.C. Section 2806*

Federal law may preempt state law in at least three ways. First, Congress may expressly declare its intention to preclude state regulation. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). "If the intent of Congress is clear, that is the end of the matter; for the court must give

effect to the unambiguously expressed intent of Congress." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990), (quoting, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Second, in the absence of an express declaration, implied preemption may exist when federal law is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementing state regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Finally, federal law may preempt state law "to the extent that it actually conflicts with a valid federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, (1978). Preemption may also occur when compliance with both federal law and state law is physically impossible. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). Preemption may also occur where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

That Congress did not expressly preempt all state laws and remedies applicable to dealings between oil companies and their franchisees is immediately evident from the limiting language of § 2806, PMPA's preemption provision. Neither can it be reasonably inferred from passage of PMPA that Congress has enacted legislation sufficiently comprehensive to leave no room for supplementing state regulation. In this case, because the area is traditionally regulated by state law, "we start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption

against preemption of state law is a strong one.

Finally, as will be further demonstrated, the state laws upon which the Attorney General's position rests neither conflict with PMPA (1) by creating a compliance dilemma where compliance with both federal and state law is impossible, nor (2) stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress.

Simply stated, by its own language, PMPA's preemptive effect is clearly limited to only state laws directly governing "grounds for, procedures for, and notification requirements with respect to termination." None of the challenged provisions of S.B. 235 meet this threshold requirement of being "with respect to termination or nonrenewal." Rather, the subject claims relate to conduct of the parties in the formation of the relationship, or in the substantive aspects of the franchise agreement itself.

Mobil's argument in the District Court, as well as in the Fourth Circuit, was that if consideration of state law claims in a controversy, in which a PMPA termination or nonrenewal is a pertinent circumstance, would affect the outcome then preemption applies. Implicit in Mobil's position is the notion that the Court should address any preemption issues herein by resort to "conflict analysis". This is clearly a misstep.

Since its 1947 decision in *Rice*, this Court has consistently made clear the fact that "conflict preemption" rules have no application when the statute has an express preemption provision. This doctrine has been recently

reinforced by this Court's most recent preemption pronouncement in *Cipollone v. Liggett Group, Inc.*, 120 L. Ed.2d 407 (1992), which held that the preemptive scope of a federal statute is determined exclusively by examining the express language of the preemption provision and not by the application of an implied preemption standard. This same reasoning Mobil advances was rejected in *Cipollone*.[1]

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[1] In *Cipollone*, this Court considered whether a federal statute, or its predecessor, (Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222,84 Stat. 87 (1969) (Current version at 15 U.S.C. 1331 *et seq.*, 1988) both of which required every cigarette package to contain a conspicuous warning of the hazards of smoking, preempted common law claims against cigarette manufacturers. Both federal statutes in question contained a specific preemption provision. This Court held that the preemptive scope of a federal statute is determined exclusively by examining express language of the preemptive provision:

> In our opinion, the preemptive scope. . .is governed entirely by the express language in. . .each Act. When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," . . ."there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation.

Cipollone at 2618 (citations omitted).

In *Cipollone*, this Court reinforced and strengthened its previous holdings relating to the presumption against preemption. This Court articulated a preemption analysis which construed the applicable preemption provision narrowly, in keeping with the intent of Congress.

The task in this case, then, is simply to apply rules of statutory construction to the express preemption provision found in 15 U.S.C. Section 2806(a). Such a determination of whether Section 2806(a) provides for preemption of the relevant provisions of S.B. 235 asserted herein requires a review of the legislative history of the PMPA generally, and of PMPA's preemption provision specifically.

D. Legislative History of the PMPA Establishes That Franchisee Protection is the Primary Statutory Purpose and Objective

Any review of the legislative history of PMPA can only come to the same conclusion as the commentators have, that the primary objective and purpose of the PMPA was protection of franchisees from abuse at the hands of oil companies exploiting their superior bargaining power:

> "It is apparent from the legislative history (of PMPA) that Congress was responding to what it perceived as a pattern of abuse by oil companies of their franchise relationships with petroleum retailers." *Note, Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict &*

Diversity, 32 Emory L. Journal 273 (1983) at 274.

The PMPA was the culmination of several years of hearings on the subject of gasoline marketing. *See, Comment, Retail Gasoline Terminations and Nonrenewals Under Title One of the Petroleum Marketing Practices Act*, 1980 Duke L. J. 522, 529, n. 40. PMPA was fully intended to act as a check on the franchisor's self-interest. The explicitly stated purpose of the Act was "to provide for the protection of franchised distributors and retailers of motor fuel. . . and to prevent deterioration of competition in gasoline marketing." [*Cong. Record*, April 5, 1977. p. H10378, statement of Rep. John Dingell (the primary author of PMPA)]. It was the undisputed disparity of bargaining power between oil companies and dealers, plus numerous allegations of coercive and unfair franchisor practices, which lead Congress to enact the PMPA in order to establish uniform minimum standards and procedures to protect "franchisees from arbitrary or discriminatory termination or non-renewal of their franchisees." S. Rep. No. 95-731, 95th Cong., 2d Sess.; *Roberts v. Amoco Oil Company*, 740 F. 2d 602, 604-605 (8th Cir. 1984). Indeed, it has universally been recognized that while PMPA is a balanced piece of legislation, it is balanced *toward franchisees*, not franchisors. Hearings on HR 130, 95th Cong., 1st Sess. pp. 158, 226.

Numerous Courts of Appeals have recognized that PMPA is remedial legislation which must be construed broadly in order to effectuate its remedial purpose; *See, e.g., Barnes v Gulf*, 795 F. 2d 358 (4th Cir. 1986); *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, 304 n. 3 (2d Cir. 1986); *Brach v. Amoco Oil Company*, 677 F. 2d 1213 (7th Cir. 1982); *Roberts v. Amoco Oil Company*, 740 F.2d

602 (8th Cir. 1985); *Felts v. Amoco Oil Company*, 740 F.2d 1169 (8th Cir. 1986); *Esso Standard Oil Co., v. Dep't of Consumer Affairs*, 793 F.2d 431 (1st Cir. 1986), and was designed to benefit small retailers. *See*, *Barnes* at 305. Indeed, the Circuits are unanimous in holding that PMPA's *overriding* purpose is to protect franchisees. *See*, *e.g.*, *Barnes*, *supra* at 305 (principal concern of Act is protection of franchisee).

Based upon these expressions of congressional intent in the legislative history, it cannot be seriously argued that Congress in the name of achieving minimum uniform standards as to grounds, notice and remedies with respect to termination by supplanting the portions of the varietal state statues specifically addressing the same matters, intended to deprive franchisees of the ability to seek redress under state statutes. By this logic, all state law involvement in gasoline marketing would be preempted.

E. Federal Preemption Under the PMPA is Expressly Limited by The Language of 15 U.S.C. § 2806

Unlike many federal statutes where congressional intent must be implied, the clear and manifest purpose of Congress is expressly set out in the PMPA in 15 U.S.C. § 2806(a). As many courts have remarked in determining the preemptive scope of the PMPA, the court's task has been greatly simplified by the clear expression of legislative intent found in § 2806. *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F. Supp. 1008, 1017 (N.D. Ga. 1979), *aff'd sub nom.*, *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981), *cert. den.* 454 U.S. 932 (1981); *Lasko*, 547 F. Supp. at 216. By virtue of this express preemption clause, the preemptive effect of this legislation has been

purposely restricted.

The carefully crafted language of § 2806 and its legislative history establish that such a result was not intended by Congress. Congress only intended to occupy the field of *franchise termination and nonrenewal, not* to displace all state and local laws dealing with other matters related to franchise agreements:

> "To the extent that the provision of Title I do not apply to an aspect of the franchise relationship, *[such as formation]* State laws dealing with such aspects of the relationship are *not preempted* . . . The preemption provisions of the legislation are limited to provisions of State law dealing with termination or non-renewal of franchise relationships." S. Rep.No. 95-731, 95th Cong., 2d Sess. 15 *reprinted in* 1978 U.S. Code Cong. & Ad. News 900, 901. [emphasis added].

This distinction between state laws which expressly address termination or nonrenewal and those which do not is critical in this analysis.[2]

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[2] For example, in *Esso Standard v. Dep't of Consumer Affairs*, 793 F.2d 431 (1st Cir. 1986), The court, in the following extended excerpt, explained why state legislation which merely addresses the substantive terms of a franchise agreement is not preempted:

> "the question presented by this case is whether the balance struck by the PMPA in the area of termination and nonrenewal also impliedly gives

franchisors a substantive right to be free of state regulation of all elements of the franchise agreement. We do not believe it gives such protection. In the PMPA, Congress expressly set out the preemptive scope of that legislation; it stated that no state or local entity could adopt any provision regarding the termination or nonrenewal of franchises, or regarding the notification required for termination or nonrenewal, unless such a provision was the same as that of the PMPA, 15 U.S.C. Section 2806. Thus, the only grounds on which a franchisor can terminate or not renew a franchise, and the only grounds on which a franchisee can contest the termination or nonrenewal of a franchise would be those set out by the PMPA.

One court, commenting on the preemptive scope of the PMPA, noted that "[b]y specifying with such precision when the states must stand aside in favor of federal regulation, Congress implicitly marked out the bounds of the power it intended to exercise. Beyond those limits, state regulation may claim full approbation." *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F. Supp. 1008, 1017 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981). Thus, Congress indicated that it did not intend "to preempt all sate provisions involving the substantive aspects of petroleum products franchises." *Lasko v. Consumers Petroleum of Connecticut, Inc.*, 547 F. Supp. 211, 216 (D. Conn. 1981).

Thus, preemption occurs when state law directly regulates the grounds for termination or

The PMPA is not a comprehensive regulatory scheme and was never intended to be. Congress intended from the beginning that state law would play a role in regulating the franchise relationship, and reserved for federal control only the direct termination and nonrenewal aspects of the franchise relationship. Under the construction Mobil argued, and which both the District Court and the Fourth Circuit adopted, all provisions of state common law and state regulatory schemes would be preempted, because all of them can be recast in the linguistic framework that Mobil employed in this case. All state statutory provisions and common law rights can be recast as conflicting with a franchisor's exercise of PMPA termination rights. Chief Justice Ervin, in his dissenting opinion, expressed great concern about this expansive view of Section 2806 and how the majority's opinion would result in preemption of state laws which are otherwise not peculiar to the petroleum industry. If those supplementary state laws rights are now held to be preempted then the oil companies will escape comprehensive regulation altogether. They will succeed in using the PMPA as a sword to cut down state law rights which supplement the limited protection afforded franchisees by the PMPA. Congress intended no such result. Further, had Congress intended to preempt all state statutes and common law, it would have clearly and unambiguously articulated such an intent in § 2806. Since Congress did not elect to do so it would be error to expand § 2806 to find preemption where none was

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nonrenewal of franchises, not when state law merely governs substantive elements of franchise agreements or their formation, regardless of whether termination is somehow implicated thereby."

intended.

Congress passed the PMPA over franchisor objections and explicitly limited franchisors' flexibility to demand franchisee compliance with unsafe and unreasonable contract terms. It enacted a *limited* preemption provision. Congress did not intend to limit the rights of the states to protect their citizens against wrongdoing simply to ensure continuation of the very oil company abuses it sought to curb.[3]

F. Applicable Case Law Demonstrates that S.B. 235 is Not Preempted.

Fortunately, although, not without exceptions, the case law construing Section §2806 has vindicated congressional intent. The §2806 case law represents an evolving judicial struggle with a conflict between two statutory objectives: (1) statutory protection for individual franchisees from oil

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[3] Significantly, the legislative history provides that a franchisee may not avoid the consequences of a lawful termination by the franchisor by taking refuge in the state assignment laws which were expressly not preempted by simply assigning his franchise pursuant to a state law permitting franchise assignment. *See*, 15 U.S.C. Section 2806(b). Conversely, and by analogy, a franchisor ought not to be able to avoid the consequences of wrongdoing cognizable under state law by taking refuge in the PMPA preemption provision every time a nonrenewal or termination is a circumstance pertinent to state common law claims of wrongdoing.

company abuses and (2) the establishment of uniform minimum standards for termination and non-renewal of franchises to do away with the "uneven patchwork of state laws on the subject of franchisee protection". *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 585 (3d Cir. 1989). These conflicting objectives are referred to in the legislative history.

PMPA was fully intended to act as a check on the franchisor's self-interest. *The explicitly stated purpose of the Act was to provide for the protection of franchised distributors and retailers of motor fuel. . .* and to prevent deterioration of competition in gasoline marketing. [*Cong. Record*, April 5, 1977. p. H10378, statement of Rep. John Dingell (the primary author of PMPA)]. It was the undisputed disparity of bargaining power between oil companies and dealers, plus numerous allegations of coercive and unfair franchisor practices, which lead Congress to enact the PMPA *in order to establish uniform standards and procedures to protect "franchisees* from arbitrary or discriminatory termination or non-renewal of their franchises." Senate Report. No. 95-731, 95th Cong., 2d Sess., 15-19 *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 875-77; *Roberts v. Amoco Oil Company*, 740 F.2d 602, 604-05 (8th Cir. 1984) (emphasis added).

Much of the case law reflects judicial analysis in search of a single analytically sound rule of law which adequately reconciles both objectives. Yet the conclusions reached in many cases ultimately involve a choice in favor of one or the other conflicting statutory objectives. *See e.g., Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986) (incorrectly choosing the uniformity objective over the primary statutory objective of protection

of the franchisee from oil company abuses). [*See also*, Dean Robert E. Scott, *"Chaos Theory and the Justice Paradox"*, 1993 Va. L. Rpt. 20].

The analytical struggle manifest in the §2806 case law can be explained by the fact that the cases represent a modern day encounter with the justice paradox. The quest for "present justice" consistently seeks to prioritize franchisee protection over the uniformity achievable through expansive preemption in order to optimize achievement of a just resolution between the particular parties. The quest for "future justice" under PMPA consistently seeks prioritization of uniformity through expansive preemption.

> It is clear that no single statutory principle would be flexible enough to deal with so wide a range of potential conflicts. Therefore, the [PMPA] leaves the courts the task of resorting to *traditional principles of equity to maximize attainment of competing statutory objectives* consistently with the supremacy clause of the Constitution and the purpose of the Federal legislation. [emphasis added].

Senate Report No. 731, 95 Cong., 2nd Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, at 901.

Congress expressly contemplated that the courts would deal with the preemption issue on a case-by-case basis, in each case prioritizing and insuring to the maximum extent possible vindication of PMPA's primary purpose--franchisee protection. Fortunately, with occasional erroneous exceptions, the courts have understood and followed this congressional mandate. However, the Fourth Circuit's decision and the principal authority upon which it relied

both deviate from the path marked by Congress and the substantial case law which follows it. A close analysis of the one of the these erroneous exceptions is illustrative. The majority relied heavily on *Jiminez v. B.P. Oil, Inc.*, 853 F.2d 268 (4th Cir. 1988). *Jiminez* is not in conflict with the rationale asserted by Appellants. *Jiminez* involved a Maryland statute providing for the payment of goodwill by the franchisor to the franchisee upon franchise termination or nonrenewal. In the context of a complete market withdrawal, which is a basis for termination expressly condoned by PMPA, such a goodwill statute directly conflicts with the PMPA. The Maryland statute applies only upon a franchise termination or nonrenewal and does not relate to franchise formation or to the substance of a franchise agreement. While in *Jiminez* the Maryland statute, as pointed out by Chief Judge Ervin in his dissent, interfered with the "do's and don't's of termination or nonrenewal", the provisions of S.B. 235 address the substantive content of the franchise agreements themselves. The *Jiminez* court held that in addition to "grounds for" and "notice of" terminations or nonrenewals, preemption also applies to remedies or penalties that are applicable to attempts at termination or nonrenewal. The language of PMPA expressly applies to remedies for a violationof state law governing termination or nonrenewal of franchises. [". . .including any remedy or penalty applicable to any violation thereof. . .", 15 U.S.C. Section 2806(a)]. In the context of a market withdrawal, the Maryland statute could be construed as a "penalty" (*see*, 853 F.2d at 264), or as a "toll to be extracted from withdrawing distributors" (*Id* at 262); a toll or penalty that applies only in the case of a franchise termination. The *Jiminez* court took great pain to make clear that its opinion was limited to the specific facts of the case, i.e., a valid market withdrawal termination

under PMPA, (". . .facts allow us to conclude PMPA preempts *in this context*", 853 F.2d at 261), the language of the statute at issue, as well as the legislative history, indicate that PMPA preempts remedies for a violation of state law governing franchise termination or nonrenewal.

Mobil relied heavily on *Consumers Petroleum, supra*, for the position that the dealers' state law claims were preempted in this case. *Consumers* was decided before this Court's holding in *Cipollone*, and contrary to that holding, the court applying "conflict" analysis, erroneously deemed a conflict to exist between the notice period required by PMPA for market withdrawal and the representations of future franchise longevity made to a franchisee. In a holding that is in conflict with other authority discussed below, the court found the state common law claims preempted. However, this analysis (that the state law claims presented were preempted because they had the effect of frustrating the uniformity of the PMPA notice requirements) deviates from congressional intent according to more sound judicial treatment of the issue in other cases. The *Consumers* court, by discarding equitable considerations in favor of the "uniformity of procedures" objective, proceeded in a manner contrary to the congressional guidance of balancing in favor of franchisee protection.[4]

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[4] The *Consumers* court itself recognized that the PMPA does *not* preempt every state law that "relates remotely to the termination or nonrenewal of petroleum franchises." 804 F.2d at 915. Struggling with the perceived conflict between the statutory objectives of uniformity and franchisee protection, the court incorrectly chose to

prioritize uniformity, and then compounded its error by recasting the state law claims raised therein as an attempt by Consumers to vary the PMPA notice requirements. The *Consumers* court reached a narrow holding by determining that "*the claim as it arises in this case*" has the "direct effect of seeking to impose a longer notice requirement upon Texaco than that required under the PMPA." *Id.* at 915 (emphasis added). The court did not address whether Texaco could, by agreement or other action, impose a requirement on itself which exceeded the minimum requirements of the PMPA.

The inclusion of the language "the claim as it arises in this case" reflects the narrow holding decided by the *Consumers* court. The *Consumers* court also recognized that "on its face, a claim for misrepresentation or fraud does not appear to relate to the nonrenewal or notice requirements of the act." *Id.* at 915.

The dissent in *Consumers*, although concurring in the court's conclusion that the franchisees' claims were preempted, wrote separately to express the belief that "we are in no way holding that the PMPA preempts all common law tort claims, or even all misrepresentation claims." *Id.* at 917. The dissent noted:

> Whereas the misrepresentation claim in this case has the *effect* of changing the notification requirements, such may not always be the case, even when a misrepresentation claim is raised in conjunction with challenging the termination of a franchise

The majority in *Consumers*, as well as the Fourth Circuit, relied on *Darling v. Mobil Oil Corp.*, 864 F.2d 981 (2d Cir. 1987). This decision is at odds with a significant body of case law interpreting the preemptive effects of the PMPA. *See, e.g., O'Shea, supra* ["we believe that PMPA only preempts state laws that limit the permissible substantive reasons that a petroleum franchisor can terminate a franchisee. It thus would not preempt the general common law rule that contracts entered into by fraud are unenforceable. The goal of the framers of the PMPA was to create a uniform system of franchise termination, not a uniform system of contract law. There is no reference to any legislative intent to preempt the general common law of contract, even to the extent that it may become involved in a PMPA action. . . . "[F]ranchise agreements governed by PMPA are to be interpreted according to state contract law." . . . O'Shea's fraudulent inducement claim was not a PMPA claim but instead a state law claim that was not preempted by PMPA].; *Esso Standard Oil Co., v Department of Consumer Affairs*, 793 F 2d. 431 (1st Cir. 1986); *Civitella v. Shell Oil Co.*, 656 F. Supp. 144 (D. Ariz. 1986); *Lasko v. Consumers Petroleum of Connecticut*, 547 F. Supp 211, 216 (D. Conn. 1981); *L.C. Williams Oil Co. Inc. v. Exxon Corp.*, 627 F. Supp. 864 (M.D.N.C. 1985); *Hanes v. Mid-America Petroleum Inc.*, 577 F. Supp. 637 (W.D. Mo. 1983); *Wojciechowski v. Amoco Oil Co.*, 483 F. Supp. 109 (E.D. Wisc. 1980); [where a franchisor intentionally misleads a franchisee to enter into a franchise, state law can be applied to vary the PMPA and deny the franchisor the benefit of favorable provisions thereunder]; *Clark v. Mobil*, 496

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agreement. *Id.* at 917.

F. Supp. 132 (E.D. Mo. 1980), *aff'd*, 652 F.2d (8th Cir. 1981) [the court suggested that representations by the franchisor regarding the procedure it would follow in exercising its right to terminate under PMPA would bind the franchisor if such representations induced the franchisee to enter into the franchise, even if such representations varied from the PMPA requirements]; *Bellmore v. Mobil, supra. Adams v. Iowa Oil Co.*, CCH Bus. Franch. Guide ¶ 8008 (Iowa 1983) [preemption of common law contract and tort claims may *not* be decided on summary judgment].

Consumers is also diametrically opposed to the decision reached in *Civitella, supra.* The *Civitella* court analyzed the decision reached in *Consumers*, and expressly rejected its conclusion. In declining to follow *Consumers*, the court held that the Sixth Circuit "recast Consumer Petroleum Company's fraud complaint into notice terms, and dismissed the case since the plaintiff had received proper notice under PMPA." *Id.* at 146. The *Civitella* court noted that Civitella's complaint could also be recast to impose upon the franchisee a duty to provide notice of a market withdrawal earlier than PMPA requires. The *Civitella* court also stated that the PMPA nowhere suggests that the parties may not contract to provide franchisees with greater protection than the PMPA offers. *Id.* Where the parties have agreed to longer notice, for instance, the franchisor should not be able to invoke the PMPA to escape the consequences of a breach. This Court should not allow the oil companies to invoke the PMPA to escape the consequences of compliance with state statutes, such as S.B. 235. Such a result would clearly vitiate congressional intent.

In *O'Shea, supra,* the court held:

> [T]he PMPA preempts only those state laws that regulate the "grounds for, procedures for, and notification requirements with respect to termination," to the extent such laws are not the same as the PMPA. . . . The law involved in O'Shea's contract claims in no way involved "procedures for" or "notification requirements with respect to" termination. And with respect to grounds for termination. . .*we believe that PMPA only preempts state laws that limit the permissible substantive reasons that a petroleum franchisor can terminate a franchisee. It thus would not preempt the general common law rule that contracts entered into by fraud are unenforceable. The goal of the framers of the PMPA was to create a uniform system of franchise termination, not a uniform system of contract law*. The Senate Report on the Bill refers to legislative intent to preempt the patchwork os State laws that the states had adopted to address "petroleum products franchising problems: Senate Report at 19. *There is no reference to any legislative intent to preempt the general common law of contract, even to the extent that it may become involved in a PMPA action. . .*" [F]ranchise agreements governed by PMPA are to be interpreted according to state contract law". . .O'Shea's fraudulent inducement claim was not a PMPA claim but instead a state law claim that was not preempted by PMPA.

Id. at 592, 593 (emphasis added) (citations omitted). *See*

also, Pride v. Exxon, 911 F.2d 251, 254 (9th Cir. 1990). [5] [holding that Oregon state law regarding fraud in the formation of contracts does not implicate the grounds for, procedures for, or notification requirements of termination or nonrenewal within the scope of the PMPA and held that such claims were not preempted. The Ninth Circuit reversed the district court's holding on preemption, noting that the district court had incorrectly relied on *Consumers*, and instead should have followed *O'Shea*. The court reasoned that PMPA applied to termination and that the subject common law claims related to formation--fraudulent inducement to enter into the franchise itself].

S. B. 235 also regulates formation. Simply because S.B. 235 regulates formation and substantive terms of franchise agreements does not render it to be "with respect to termination" and therefore preempted. As the court noted in *Exxon Corp. v. Georgia Ass'n. of Petroleum Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd.* 644 F. 2d 1030 (5th Cir. 1981); *cert. denied*, 454 U.S. 932 (1981):

> Congress carefully tailored the preemptive effect of the PMPA, and we would betray its purpose by reaching unnecessarily to find conflict with state law . . . . The provision [at issue] aims directly at the terms of a franchise agreement, and could have at best some fortuitous and attenuated application to

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[5]While *O'Shea*, *Civitella* and *Pride* apply PMPA preemption analysis to the requirements of state common law with respect to the formation of contracts, the rationale thereof applies equally to such requirements imposed by statute, such as S.B. 235.

> a lawsuit over termination or non-renewal of a franchise relationship. Again, the court will not go to unnecessary and unprincipled lengths to find state-federal conflict.

Id. at 1018.

Although the courts have been cautioned not to go to unnecessary and unprincipled lengths to find state/federal conflict, the *Consumers* court and the Fourth Circuit herein, appear to have travelled down this ill-advised path. The case law reflects the inherent contradiction between the statutory objectives. Consistent with congressional guidance, the sounder line of cases embraces equitable considerations in resolving preemption issues in recognition of the primary purpose of the statute--franchisee protection.

Of particular clarity and applicability on this point in the present controversy is the analysis of the Tenth Circuit in *Filiaga v. Chevron, supra*, No 89-4098 (10th Cir July 20, 1990) Unpublished opinion, copy attached as Exhibit A). In *Filiaga*, Chevron sought to force a franchisee out of a service station upon the expiration of Chevron's underlying lease. The franchisee sued claiming, *inter alia*, Chevron was equitably estopped because a Chevron employee had represented to the franchisee that Chevron would exercise its renewal option and extend the underlying lease term for an additional ten years.

Both the magistrate's Report and Recommendation and the District Court's *de novo* affirmation thereof in *Filiaga* held the franchisee's equitable claims preempted by PMPA's nonrenewal procedures and Chevron's facial/technical compliance therewith sufficient with no inquiry into the

franchisee's contentions. Reversing both holdings, the Tenth Circuit reasoned:

> The legislative history supports the view that equitable estoppel should be considered even in the face of compliance with the Act. . . .[quotations omitted]. *It would be anomalous for us to interpret the statute as preempting equitable protection from this very destruction of reasonable expectation.* Furthermore the legislative history goes on to state:"It is clear that no single statutory principle would be flexible enough to deal with so wide a range of potential conflicts. Therefore, the [PMPA] leaves the Courts the task of resorting to traditional principals of equity to maximize attainment of competing statutory objectives consistently with the supremacy clause of the Constitution and the purpose of the Federal legislation.

[Senate Report No. 731, 95th Congress 2d sess. 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, at 901.]

Filiaga, supra at 5, 6. [emphasis added].

Appellant respectfully suggests that the analysis of the Fourth Circuit follows the same temptingly simple but erroneous path of elevating uniformity over franchisee protection which was pursued by the *Consumers'* court, the district court in *Pride*, and the Magistrate and District Court in *Filiaga*.

This case not only deals with the issue of preemption of S.B. 235 by the PMPA but also, and in a larger sense, represents another in a series of cases in which federal

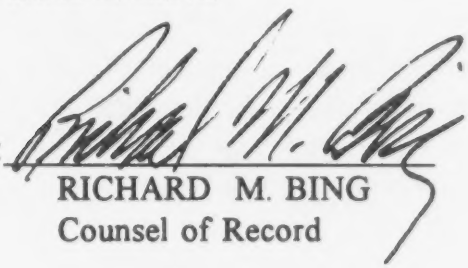
courts are eroding the principles of federalism which is inherent in our system of justice. Rather than construing Section 2806 narrowly, consistent with congressional intent, the Fourth Circuit interpreted that section in an expansive manner. Such a rationale leaves states with no ability to exercise their inherent police powers in areas which have been traditionally been their domain, such as regulation of contracts. Further, under the Fourth Circuit's rationale, not only would statutes such as S.B. 235 be preempted, but courts would have to find other statutes, not peculiar to the petroleum franchise scenerio, likewise preempted by Section 2806. Appellant urges this Court to grant its Petition for Writ of Certiorari and reverse the decision of the of the Fourth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

PEARCE & BING

By: 

RICHARD M. BING
Counsel of Record

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PUBLISHED

United States Court of Appeals
FOR THE FOURTH CIRCUIT

MOBIL OIL CORPORATION,

Plaintiff-Appellee,

v.

VIRGINIA GASOLINE MARKETERS AND AUTOMOTIVE REPAIR ASSOCIATION, INCORPORATED,

Defendant-Appellant,

and

ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES OF VIRGINIA,

Defendants.

MINNESOTA SERVICE STATION ASSOCIATION; IOWA RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; WISCONSIN RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS OF AMERICA,

Amici Curiae.

No. 92-2242
No. 92-2244
No. 92-2256

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-90-381)

Argued: September 30, 1993
Decided: July 19, 1994

Before ERVIN, Chief Judge, HALL, Circuit Judge,
and CHAPMAN, Senior Circuit Judge

Affirmed in part and reversed in part by published opinion. Senior Judge Chapman wrote the majority opinion in which Judge Hall joined. Chief Judge Ervin wrote a dissenting opinion.

COUNSEL

ARGUED: Peter Robert Messitt, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Richard McPhail Bing, ELMORE, PEARCE & BING, Richmond, Virginia, for Appellants. Dimitri George Daskal, Alexandria, Virginia, for Amicus Curiae Service Station Dealers of America. Thomas G. Slater, Jr., Michael J. Lockerby, Jr., HUNTON & WILLIAMS, Richmond, Virginia, for Appellee. ON BRIEF: Stephen D. Rosenthal, Attorney General of Virginia, Eric K. G. Fiske, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Gerald M. Bowen, McLean, Virginia, for Appellants. R. Hewitt Pate, Michael C. Whitticar, HUNTON & WILLIAMS, Richmond, Virginia; Edward H. Beck, III, MOBIL OIL CORPORATION, Fairfax, Virginia, for Appellee. Randy V. Thompson, PERSIAN, MACGREGOR & THOMPSON, Minneapolis, Minnesota, for Amici Curiae Minnesota Service Station Association, et al.

OPINION

CHAPMAN, Senior Circuit Judge:

This case addresses the validity of amendments to the Virginia Petroleum Products Franchise Act under the United States and Virginia Constitutions. These amendments, known collectively as S.B. 235, prevent the inclusion of certain terms in agreements between petroleum refiners and their franchisees. Mobil Oil Corporation brought suit against the Attorney general of Virginia seeking a declaratory judgment that S.B. 235 is unconstitutional and an injunction preventing S.B. 235's enforcement. The Attorney General appeals the district court's determination that the Petroleum Marketing Practices Act, 15 U.S.C.A. Section 2801-2806 (West 1982), preempts all but the "rent control" provision of S.B. 235, and that S.B. 235 violates the Virginia Constitution's prohibition on special laws. Mobil appeals the district court's grant of summary judgment against Mobil on its claims: (1) that S.B. 235 violates the Contract and Takings Clauses of the United States Constitution, (2) that the Act is preempted by the Lanham Act, and (3) that the "rent control" provision is preempted by the PMPA.

I.

Mobil Oil Corporation is involved in all aspects of the petroleum industry, including exploration, drilling, production, refining, and distribution. Mobil brand petroleum products are marketed to the public through service stations, most of which fall into one of four categories:

1) SALOPS (Salary Operated), which are owned and operated by Mobil and staffed with salaried personnel;

2) OG&L (Owned Station, Ground Lease Station and Leased Station), which are operated by franchisees who lease their stations and equipment from Mobil;

3) N (no lease dealers) operated by independent owners, who purchase Mobil petroleum products under franchise agreements;

4) Distributor Stations, which are owned and operated by wholesale distributors of Mobil products.

The Petroleum Marketing Practices Act (PMPA) governs the relationship s between petroleum refiners and their retail franchisees. The PMPA's primary purpose is to protect petroleum franchisees from arbitrary or discriminatory terminations and nonrenewals. S. Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S.C.C.A.N. 873, 874. This Act also serves two secondary purposes; to provide uniformity in the law governing petroleum franchise termination and nonrenewal, and to allow franchisors flexibility in dealing with franchisee misconduct or changes in market conditions. 1978 U.S.C.C.A.N. at 877. It expressly preempts state law governing termination or nonrenewal which differs from its provisions. 15 U.S.C.A. Section 2806(a).

The Virginia Petroleum Products Franchise act (VPPFA) also regulates the refiner-franchisee relationship.

Va. Code Ann. Section 59.1-21.8 to -21.18(1) (Michie 1992). S.B. 235 became effective as an amendment to the VPPFA in July 1990 and contains:

1) a prohibition on gasoline purchase or sales quotas (the "no quotas" provision) (59.1-21.16(2)(C));

2) a prohibition, with an exception not relevant here, on refiner-required hours of operation exceeding sixteen consecutive hours per day or six days per week (the "no minimum hours" provision) (59.1-21.11(1));

3) a requirement that rents be "based on commercially fair and reasonable standards" and "uniformly applied to similarly situated dealers of the same refiner in the same geographic area" (the "rent control" provision) (59.1-21.11(6));

4) a requirement that all franchise renewals extend at least three years (the "minimum renewal" provision) (*Id.*); and

5) a prohibition on refiner limits as to the number of stations a single dealer can operate (the "no maximum stations" provision) (59.1-21.11(4)).

These sections prohibit certain terms contained in Mobil's standard service station franchise agreements. [1] Mobil claims that when it ceased enforcing the prohibited terms so as to comply with S.B. 235, its sales and the profitability and value of its service station operations in Virginia declined.

Mobil filed suit against Virginia's Attorney General on June 29, 1990 claiming S.B. 235 was unconstitutional because: 1) it was preempted by the PMPA; 2) it violated the Special Laws provision of the Virginia Constitution; 3) it was preempted by the Lanham Act; 4) it violated the Contract Clauses of the United States and Virginia Constitutions; and 5) it violated the Takings Clauses of the United States and Virginia Constitutions. At the close of discovery, the Attorney General moved for summary judgment on its claims that S.B. 235 was preempted by the PMPA and violated Virginia's special laws prohibition. The district court found that the questions of PMPA preemption and the Special Laws violation were ripe for summary judgment, but that additional evidence on the Lanham Act, Contract Clause and Takings Clause claims would be necessary. The court reserved ruling on the summary judgment motions and heard the testimony of a number of witnesses.

The district court then found that S.B. 235 was not preempted by the Lanham Act, that the Virginia Act did not

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[1]Because S.B.235 governs only franchise agreements, Mobil's relationships with SALOPS and distributor stations are not affected.

violate the Contract Clause or the takings Clause, and that the PMPA did not preempt the "rent control" provision of S.B. 235. The court granted Mobil's cross motion for summary judgment in part, and found that S.B. 235 violated Virginia's special laws prohibition and that the PMPA preempted the "no quotas", "no minimum hours", "no maximum stations", and "minimum renewal" provisions of the Virginia Act. Both parties appeal. [2] The Virginia Gasoline Marketers and Automotive Repair Association, the national dealers' organization and similar groups from other states filed amicus briefs supporting the Attorney General's position on the issue of PMPA preemption, and we have considered these briefs in reaching our conclusions.

II.

Under the Supremacy Clause of the United States Constitution, federal law may preempt state legislation governing the same subject matter. U.S. Const. art VI, cl. 2.; *Louisiana Pub. Serv. Comm'n v. FTC*, 476 U.S. 355, 368 (1986). Preemption will occur if Congress has expressly stated its intent to preclude state regulation of the subject. 476 U.S. at 368. The PMPA contains the following express preemption clause:

> To the extent that any provision of this subchapter applies to the termination (or the furnishing of

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[2] Although the district judge heard testimony on some issues, he did not make any findings of fact that have been contested and all parties have addressed this appeal as being from summary judgment. We have reviewed the district court's action under the summary judgment standard.

> notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect *any provision of any law or regulation* (including any remedy or penalty applicable to any violation thereof) *with respect to* termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship *unless* such provision of such law or regulation is *the same as* the applicable provision of this subchapter.

15 U.S.C.A. Section 2806(a) (West 1992) (emphasis supplied). Thus, any state law "with respect to" termination and nonrenewal is preempted if it is not "the same as" the PMPA's provisions on termination and nonrenewal. The challenged provisions of S.B. 235 are not "the same as" the PMPA because they prohibit contractual terms the PMPA does not directly address. Nevertheless, the Attorney General contends that S.B. 235 is not preempted because it is not "with respect to" termination and nonrenewal.

The Attorney General argues that PMPA only preempts state statutes that expressly address termination and nonrenewal. He argues that S.B. 235's prohibition on certain contractual terms addresses "substantive" contract elements and thus is not "with respect to" termination and nonrenewal. Resolution of the preemption issue therefore turns on whether S.B. 235 is properly considered regulation "with respect to" termination or nonrenewal.

In *Jiminez v. B.P. Oil Co., Inc.*, this court held that a Maryland statute requiring franchisors to make goodwill payments upon franchise termination was preempted by the PMPA in the context of the franchisor's complete withdrawal from the geographic market. 853 F.2d 268, 272-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989). The *Jiminez* court rejected the franchisee's argument that the PMPA preempted only state laws regarding the grounds for termination, and not statutes regarding the effects of termination, and it found that Congress intended to occupy the field of petroleum franchise termination and nonrenewal. *Id.* at 273.

Like the grounds/effects distinction in *Jiminez*, the Attorney General's distinction between regulation of "substantive" contract terms and direct regulation of termination and renewal is invalid on the facts of this case. The challenged provisions impact franchise termination and nonrenewal in two ways, and therefore are "with respect to termination" and "nonrenewal." First, S.B. 235 narrows the grounds for termination available to franchisors operating in Virginia. Under the PMPA, if contractual terms are reasonable and material, a franchisee's failure to comply with them is legitimate grounds for termination. 15 U.S.C.A. Section 2802(b)(2)(A) (West 1982). Unless the terms prohibited by S.B. 235 would in all circumstances be unreasonable and immaterial -- a finding we are unwilling to make -- S.B. 235 eliminates grounds for termination that would be available under the PMPA. *See Darling v. Mobil Oil*, 864 F.2d 981,987 (2d Cir. 1989). Second, S.B. 235 provides franchisees with a remedy for termination not "the same as" those set forth in the PMPA. If termination is based on noncompliance with franchise terms prohibited by S.B. 235, the franchisee may bring a wrongful termination

action claiming the termination is illegal under Virginia law. Such a wrongful termination claim would not exist absent S.B. 235, because certain terms and conditions prohibited by S.B. 235 are allowed by the PMPA.

Congress used very broad language to define the PMPA's preemptive scope. The statute preempts any state law "with respect to" termination or nonrenewal which differs from the PMPA. By denying franchisors grounds for termination that are available under the PMPA and in providing franchisees with a remedy unavailable under the PMPA, S.B. 235 impacts franchise termination and nonrenewal to a degree sufficient to fall within this broad preemption clause.

The Attorney General argues that we should deny preemption, although the plain language of the statute requires it, because preemption would frustrate the PMPA's primary purpose, which is franchisee protection. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original). The broad scope of the PMPA's preemption clause indicates that Congress chose to protect franchisees by the means provided in the federal statute and to preclude supplementary state regulation of termination and nonrenewal as a means of franchisee protection. Most petroleum franchisors do business in a number of states and Congress has provided a law to govern petroleum franchises in all 50 states to ensure uniformity.

The language of the PMPA clearly preempts legislation such as S.B. 235. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Finding S.B. 235 preempted by the PMPA adheres to the language of the statute and is consistent with Congressional intent as it furthers two of the PMPA's goals, uniformity and franchisor flexibility. We therefore affirm the district court's determination that S.B. 235's provisions regarding no quotas, no minimum hours, minimum renewals and no maximum stations are preempted by the PMPA. Unlike the district court, we see no reason to conclude differently regarding the "rent control" provision.

The district court found that the PMPA did not preempt the "rent control" provision, because this provision, unlike the other provisions of the Virginia Act, regulates the substance of franchising agreements and does not implicate termination or nonrenewal.

The PMPA provides that grounds for nonrenewal of a petroleum franchise include:

> [t]he failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if (i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and (ii) such failure is not the result of the franchisor's insistence upon such changes or

> additions for the purpose of preventing the renewal of the franchise relationship.

15 U.S.C.A. Section 2802(b)(3)(A) (West 1982). Under this section, if the franchisor and franchisee are unable to agree on rent, the franchisor may refuse to renew provided he acts "in good faith and in the normal course of business" and not "for the purpose of preventing the renewal." However, under S.B. 235, even if the franchisor complies with the PMPA, a franchisee may contest a nonrenewal on the ground that rent demanded is not "based on commercially fair and reasonable standards" and "uniformly applied to similarly situated dealers of the same refiner in the same geographic area." The "rent control" provision of S.B. 235 is "with respect to" nonrenewal because it gives franchisees grounds to challenge nonrenewals that are valid under PMPA. *See Esso Standard Oil Co. v. Department of Consumer Affairs*, 793 F.2d 431, 434 (1st Cir. 1985) (PMPA would preempt "any law that gave a franchisee a cause of action to contest a termination, when that termination would otherwise be valid under the PMPA"). We reverse the district court's decision that the PMPA does not preempt S.B. 235's "rent control" provision.

III

The Lanham Act states that it is intended "to protect registered marks used in [interstate] commerce from interference by State, or territorial legislation." 15 U.S.C.A. Section 1127 (West Supp. 1994). Mobil argues that this language expressly preempts any state law that erodes the quality control necessary for a mark owner to protect his trademark image. Even if we assume that Section 1127 is an expression of intent to preclude state law, rather than

merely a general statement of purpose, [3] protection of "registered marks" does not encompass a statute such as S.B. 235 which does not govern the appearance of, the ownership of, or the right to use franchisors' registered marks.

Although the Lanham Act does not expressly preempt S.B. 235, it may do so by implication. Federal law may preclude state law that is inconsistent with or frustrates the objectives of the federal law. *See Louisiana Pub. Serv. Comm,n v. FCC*, 476 U.S. at 368. The Lanham Act gives a mark owner the right to control the quality of goods

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[3] This is uncertain since the Lanham Act contains another provision which more specifically preempts state law:

No state or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

15 U.S.C.A. Section 1121 (West Supp. 1994). this provision does not invalidate S.B. 235 because S.B. 235 does not affect the appearance of Mobil's mark as displayed by licensed users.

associated with his mark. *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 107 (4th Cir. 1991). Mobil contends that the "no maximum stations", "no quotas," and "no minimum hours" provisions of the Virginia Act are inconsistent with its right of quality control, because they prevent Mobil's effective regulation of the quality of goods and services sold in Mobil gas stations. We disagree.

The "no minimum hours" provision does not adversely affect the quality of services provided by Mobil service stations. Twenty-four hour service is not an integral component of the Mobil service station product or of Mobil's trademark image, because Mobil does not apply the 24 hour operation requirement consistently, and the inability to require 24-hour operation does not detract from its trademark image.

The "no maximum stations" provision does not have a significant negative impact on Mobil's quality control efforts. This provision does not alter the franchisee's obligations to uphold Mobil's standards as set forth in the franchise agreement regarding business operations, customer service, and maintenance of the station premises. In addition, since Mobil hires salaried employees to operate some of its stations and is apparently satisfied with the quality of services provided by those stations, it is difficult to understand why a franchisee should not be able to hire equally qualified persons to operate franchisee stations.

Similarly, the "no quotas" provision does not prevent Mobil from maintaining the quality of its products and services. While Mobil cannot require that franchisees purchase a minimum amount of gasoline for resale, all gasoline sold under the Mobil mark must comply with

Mobil's quality standards, and only Mobil brand gasoline may be sold through Mobil equipment. The dealer remains obligated under the franchise agreement to use "good-faith" and best efforts to maximize the sale of Mobil brand fuel, to "maintain an inventory of Mobil brand motor fuel . . . sufficient to serve customers during all business hours," to "exercise the highest degree of care and diligence in the handling, storage and sale of all products delivered to the marketing premises, and protect the quality of those products." The fact that a franchisee may not sell as much product as Mobil would desire does not adversely affect Mobil's trademark image, particularly when the product that is sold is supplied by Mobil, and the franchisee is in compliance with the other terms of the agreement.

A presumption against preemption arises when Congress does not state its intent. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988). Consistent with this presumption and with our finding that S.B. 235 does not conflict with the Lanham Act's objectives, we find that the Lanham Act does not impliedly preempt the provision of S.B. 235.

IV.

It is well established that courts should refrain from addressing constitutional questions unless it is necessary to do so. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). As we have already decided that S.B. 235 is invalid because it is preempted by the PMPA, we decline to address Mobil's arguments that S.B. 235 violates the Takings and Contract Clauses of the United States Constitution. For the same reason, we do not reach the

issue of whether S.B. 235 violates the Special Laws prohibition of the Virginia Constitution.

V.

For the reasons stated in this opinion, the decision of the district court is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART

ERVIN, Chief Judge, dissenting:

I agree with the majority that the Lanham Act does not preempt Virginia's petroleum franchise provisions. We part ways, however, because I do not agree that the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 et seq. (PMPA), through the operation of the Supremacy Clause, U.S. Const. art. VI, Section 2, preempts these Virginia laws. Accordingly, I dissent.

I.

"Where a state statute conflicts with or frustrates federal law, the former must give way." *CSX Transportation, Inc. v. Easterwood*, 123 L. Ed. 2d 387, 396 (1993).

In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, preemption will not lie unless it is "the clear and manifest purpose of Congress."

Id. at 396 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Cipollone v. Liggett Group, Inc.*, 120 L.Ed. 2d 407, 422 (1992) (plurality opinion). Indeed, the plurality in *Cipollone* indicated as well that when construing a preemption provision the outer boundaries of which are unclear, it is appropriate to adopt a narrow reading of the provision to avoid inadvertently trammeling upon state sovereignty and curtailing a legitimate exercise of state power when Congress had no such intention. 120 L. Ed. 2d at 424. [4]

A.

Congress enacted the PMPA in 1978. The statute contains three subchapters, only the first of which, titled "Franchisee Protection", is at issue here. According to the Senate report accompanying the bill, "[t]he purpose of title I of H.R. 130 is the establishment of minimum Federal standards governing the termination and nonrenewal of

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[4] As this court recently stated:

> [I]n deciphering congressional intent, we are guided by principles of federalism. Where "the regulated conduct touched interests so deeply rooted in local feeling and responsibility, . . . in the absence of compelling congressional direction, [the court] could not infer that Congress had deprived the States of the power to act." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

Feikema v. Texaco, Inc., 16 F.3d 1408, 1413 (4th Cir. 1994).

franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S.C.C.A.N. 873, 873.

The PMPA has an explicit preemption provision:

> To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

15 U.S.C. Section 2806(a). Thus, as the majority rightly indicates, this provision voids any state or local law that is not "the same as" any "applicable provision of this subchapter." However, this only applies to the extent that the state law differs with any provision of the subchapter that applies to the termination of a franchise, to the nonrenewal of a franchise relationship, or the furnishing of notice relating to either action.

As I read it, when the preemption provision nullifies "any provision of any law or regulation . . . with respect to termination . . . of any such franchise or to the nonrenewal . . . of any such franchise relationship" it reflects a desire by Congress to eliminate inconsistent state statutes that govern the ending of such contracts and relationships, both in terms of the actual mechanisms of the termination as well as the notice necessary to effectuate such termination. Unlike the majority, I expressly do not think that the statute intended to void any state law provision that indirectly affects the termination or nonrenewal of the relationship by directly affecting the substance of the franchise contract itself, since such an approach sweeps too widely, more widely than the majority intimates in its opinion. In short, while Congress regulated the "end-game" scenarios of petroleum franchise agreements, it did not intend to affect the content of these contractual relationships, which are long-standing creatures of state law. I think that both a careful analysis of the statute itself, as well as an analysis of the submerged dangers of the majority opinion, reveal the correctness of this approach.

B.

As noted above, the preemption provision requires us to begin by examining "any provision of this subchapter [that] applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship," for it is only state provisions that are not "the same as the applicable provision[s}" that are vitiated. This makes eminent sense, since in the general case, where there is an explicit preemption provision, we can expect that Congress intends

the scope of that provision to hew closely to the substantive provisions of the statute and not to unnecessarily preempt, and thus create a vacuum in, areas in which Congress has not actually legislated. The result is that the outline of the statute almost always describes the circumference of its own preemption provision.

While it will come as no surprise that the Congressional enactment is dense reading of the most unpleasant kind, it is necessary to provide a brief overview of the statute that is being used to void the state law in question. Title I of the PMPA has three substantive provisions. All three deal exclusively with the allowability of and procedural issues related to the termination and nonrenewal of a franchise or franchise relationship. Section 2802(a) acts as a general prohibition against termination or nonrenewal of franchises except as allowed by Section 2802(b) or Section 2803. Section 2802(b) begins by requiring, for either terminations or nonrenewals, notice from the franchisor that conforms to strict rules, and then sets forth the rules with which terminations or nonrenewals must comply. Thus, Section 2802(b)(2) lists grounds for termination or nonrenewal of a franchise, which include failure by the franchisee to comply with any reasonable and materially significant provision of the franchise, provided certain notice is given; a failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, provided certain warnings are given first; and an agreement in writing between the franchisor and franchisee to terminate or not renew, among other reasons. 15 U.S.C. Section 2802(b)(2).

Section 2802(b)(3) lists grounds for nonrenewal of the franchise relationship, including the failure of the parties

to agree to changes or additions to the provisions of the franchise, provided the failure to agree is not a sham and such changes are determined to be necessary in good faith; the receipt of numerous customer complaints; and the failure to operate the premises in a clean, safe manner, among other reasons. *Id.* Section 2802(b)(3).

Section 2803 acts as an exception to the requirements of Section 2802 for franchise relationships involving "trial" or "interim" franchises, with extensive definitions as to which franchises fall within the scope of its exception. Finally, as noted above, Section 2804 governs the type and timing of notice required in advance of termination or nonrenewal.

This brief overview of the provisions of the PMPA indicates that the Act has a unitary focus on the architecture of the ending of franchises and franchise relationships. It thus prohibits any termination at all, except those that comply with its detailed provisions, and lists under what circumstances the relationship can be ended through termination or nonrenewal. It also provides strict rules concerning the notification requirements when the end is near.

What is conspicuously absent is any language governing the *substance* of the franchise itself. The closest it comes is in Section 2802(b)(2)(A). But even this subsection is neutral concerning the substance of the provisions that will justify termination. Contrary to Mobil's suggested approach, it merely states that, if some provision of the agreement is being cited as the basis for termination, it had better be a "reasonable" and materially significant one or else the inference is that it is pretextual and thus

prohibited.

Understanding that the operative provisions of the PMPA govern not the substantive contents of the franchise relationship or of a particular franchise contract, but only reasons and circumstances under which such a relationship or contract can be abandoned, a rereading of the preemption provision makes clear the narrowness of its scope. By its terms, it only preempts "any provision of any law or regulation . . . with respect to termination" or nonrenewal or the notice related thereto that is not "the same as the applicable provision" of the subchapter. given that the only effect of the federal law's provisions is upon the *contours* of the relationship,but not upon its *content*, the limitation of the preemption provision to knocking out only those state laws not "the same as" the federal law clearly demonstrates that state laws that concern the substantive provisions that either must or may be included in the contract relationship are untouched by the PMPA.

Under this approach, state and federal law interact harmoniously to provide explicit governance of each part of the contractual relationship. Thus, states remain free to establish and develop the law governing the substance of petroleum franchises, an area of contract law historically governed by the states, while federal law is interjected only to impose uniformity upon the terms and conditions for the ending of that relationship. A practical glance at these relationships explains the logic of this burden-sharing: while the substance of the relationships is left to the states to regulate in conformity with their local needs and circumstances, the widespread abusive manipulation by a small number of national and multi-national oil companies of the terminations of "uppity" small franchisees to maintain

their dominance justified a federal solution to a pervasive problem. [5] While federal law addresses a common problem, state law is not discarded in toto; rather, it retains its

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[5] The legislative history of the PMPA explains that one of its principal goals was to "remedy[ ] the disparity in bargaining power between franchisors and franchisees." It goes on to note:

> In recent years the friction between franchisors and franchisees in marketing of motor fuels has become so great that it has threatened adverse impacts upon the Nation's motor fuel distribution and marketing system. Numerous States have initiated various legislative actions to address these petroleum product franchising problems. These actions have, unfortunately, resulted in an uneven patchwork of rules governing franchise relationships, which differ from State to State.
>
> Needed is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non-renewal of a franchise relationship. *Such a set of rules would clearly define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or non-renewal of the franchise relationship.*

S. Rep. No. 731, 95th Cong., 2d Sess. 18-19, 1978 U.S.C.C.A.N. at 877 (emphasis supplied).

historic place within the federal scheme as the origin of the substantive law of the franchise relationship.

Prior treatment of the PMPA by this Circuit does not contradict this understanding of the statute. In *Jiminez v. BP Oil, Inc.*, 853 F.2d 268, 273 (4th Cir. 1988), *cert. d*enied, 490 U.S. 1011 (1989), we struck down a Maryland statute that required a franchisor to make goodwill payments upon termination of a franchise without consent of the franchisee. And justly so, since such a law interferes with the PMPA's careful regulation of the dos and don'ts of termination or nonrenewal; the congruity in purpose between the PMPA and the Maryland statute was apparent. In contrast, the Virginia statutes considered here relate not to the mechanics or terms of termination or nonrenewal, but rather address the substantive content of the contractual agreements themselves.

C.

My greatest concern with the majority opinion stems not from what it says, but rather from what it suggests by implication. Each of the Virginia provisions is struck down because it "narrows the grounds for termination available to franchisors operating in Virginia." *Ante*, at 9. Because these provisions add or subtract from a ground upon which termination can be predicated, it "relates to" termination.

But certainly this reaches too far. For under this theory, any changes in state law, not just those particular to the petroleum franchise scenario, that affect the substance of these contract relationships must be struck down (at least as to petroleum franchisees) because they narrow the grounds for termination. There are numerous areas of state

law that control a franchise agreement, all of which are subject to this same analytic structure, and thus eligible for limitation. Unfortunately, it is impossible to state with precision which of them are nullified under the majority's approach to this case, because the best we know is that any change in the law that deviates from the status quo ante by altering the grounds for termination, i.e., any change in substantive state law of whatever origin that either an oil company or franchisee does not like, is struck down under this reading of the statute.

"The goal of the framers of the PMPA was to create a uniform system of franchise termination, not a uniform system of contract law." *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 593 (3d Cir. 1989). As the First Circuit has noted, "[t]he primary objective of the PMPA was to protect franchisees from arbitrary and discriminatory termination." *Esso Standard Oil Co. v. Department of Consumer Affairs*, 793 F.2d 431, 434 (1st Cir. 1986).

> The question presented by this case is whether the balance struck by the PMPA in the area of termination and nonrenewal also impliedly gives franchisors a substantive right to be free of state regulation of all elements of the franchise agreement. We do not believe it gives such protection.

Id. A franchise agreement is not an empty vessel; it is a legal relationship formed by and entered into against a backdrop of state law. I do not think that the limited, procedural provisions of the PMPA divested states of their governance of this area of the law. This conviction is all the stronger because of the presumption against preemption

with which we begin, which is an essential element of our federal system of government. Accordingly, I dissent. [6]

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[6] Mobil's brief raises numerous additional theories to invalidate Virginia's laws, none of which are addressed on their merits in the majority opinion. I do not address them here, except to indicate that I believe each is largely unconvincing, and that I would sustain the statutes from the various federal and state constitutional challenges brought against them.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MOBIL OIL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 3:90CV00381
ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant.	)	

FINAL ORDER

For the reasons stated in the accompanying memorandum opinion, this Court rules as follows:

(1) This Court hereby GRANTS Mobil's cross motion for summary judgment that S.B. 235 is preempted by the Supremacy Clause of the United States Constitution and the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 et seq. ("PMPA") as to the "no minimum hours" provision; the "no maximum stations" provision; the "minimum renewal" provision; and, the "no quotas" provision. The Attorney General's motion for summary judgment is accordingly DENIED;

(2) this Court hereby DENIES Mobil's motion for summary judgment that the "no rent controls" provision of S.B. 235 is preempted by the PMPA;

(3) this Court hereby GRANTS the Attorney General's motion for summary judgment regarding Mobil's assertion that certain provisions of S.B. 235 are preempted by the Supremacy Clause of the United States Constitution and the Lanham Act, 15 U.S.C. Section 1121(a);

(4) this Court hereby GRANTS the Attorney General's motion for summary judgment regarding Mobil's claim that certain provisions of S.B. 235 violate the Takings Clause of the United States and Virginia Constitutions;

(5) this Court hereby GRANTS the Attorney General's motion for summary judgment regarding Mobil's assertion that certain provisions of S.B. 235 violate the Contract Clause of the United States and Virginia Constitutions;

(6) this Court hereby GRANTS Mobil's cross motion for summary judgment asking this Court to declare certain provisions of S.B. 235 in violation of the "Special Law" prohibition of the Virginia Constitution. The Attorney General's motion for summary judgment on this matter is accordingly DENIED; and,

(7) any challenge to the "below cost credit card" and "limited construction" provisions are MOOT.

And it is SO ORDERED.

/S/ JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

Date: 1 SEP 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MOBIL OIL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 3:90CV00381
ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Pursuant to the Declaratory Judgments Act, 28 U.S.C. Section 2201 and Fed. R. Civ. P. 57 and 65, plaintiff Mobil Oil Corporation ("Mobil") seeks a declaratory judgment that the 1990 amendments ("S.B. 235") to the Virginia Petroleum Products Franchise Act ("VPPFA"), Va. Code Sections 59.1-21.8 *et seq.*, are unconstitutional under both the Virginia and Federal Constitutions. Plaintiff Mobil is a corporation organized under the laws of the State of New York whose principal place of business is Fairfax, Virginia. Defendant Attorney General, as the chief law enforcement officer of the Commonwealth, is sworn to uphold and enforce Virginia laws. Va. Code Section 2.1-117.

In 1988, there were 5,278 retail outlets for the sale of motor fuel in Virginia. [1] As of December 31, 1989, Mobil had 176 MOBIL brand service stations in Virginia. The four principal types of these stations are:

(1) "SALOPS" (salary operated), which Mobil both owns and operates with its own salaried personnel. Salops account for 32 percent of MOBIL brand motor fuel sold in the Commonwealth and 15 percent of the service stations;

(2) OG&L dealers (Owned station, Ground Leased station, and Leased station), who lease their service station properties from Mobil. OG&L stations account for approximately 36 percent of the MOBIL brand motor fuel sold in Virginia, and 20 percent of the service stations;

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[1]Of those stations, 2.7 percent were operated directly by major refiners such as Mobil, Exxon or Shell; 12.7 percent were operated by independent dealers under a major refiner's brand name; 44.6 percent were operated by "jobbers", or motor fuel wholesalers who may also operate retail stations, and "jobber-dealers" under a major refiner's brand name; 4.3 percent were operated under a major refiner's brand name by dealers who own their service station properties; 6.5 percent were operated by "non-major" refiners such as Fina, Hess or Conoco; 0.4 percent were operated by independent dealers under a non-major refiner; 4.5 percent were operated by jobbers and jobber-dealers under a non-refiner's brand name; and 24 percent were operated by chain merchants who sell motor fuel bought from refiners under non-refiner brand names.

(3) "N Dealers" (No Lease), who own their stations sites and purchase MOBIL brand products under franchise agreements with Mobil. N Dealers account for approximately four percent of the MOBIL brand motor fuel sold in Virginia, and six percent of the service stations; and

(4) "Distributor stations", operated by wholesale distributors of MOBIL brand products. Distributor stations account for approximately 28 percent of the MOBIL brand motor fuel sold in the Commonwealth, and 59 percent of the stations.

As passed, S.B. 235 restricts certain franchising arrangements between refiners and service station operators. The bill involved intense lobbying, both by Mobil and by the predecessors of the Intervenors, Virginia Gasoline Marketers and Automotive Repair Association ("VGMARA").[2]

This case appears on remand. The Fourth Circuit reversed this Court's dismissal for lack of a justiciable claim or controversy granted to the Attorney General. *Mobil Oil Corp. v. Attorney Gen. of Virginia*, 940 F.2d 73 (4th Cir. 1991).

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[2]The two predecessors to VGMARA were the Virginia Gasoline and Automotive Repair Association ("VGARA") and the Virginia Service Station and Auto Services Association ("VSSASA"). In January of 1991, these two groups merged to form VGMARA.

I.

Mobil requests declaratory and injunctive relief. It makes five arguments challenging seven specific provisions of the law. Mobil's arguments follow:

> (1) certain provisions of S.B. 235 are preempted by the Supremacy Clause of the United States Constitution and the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 *et seq.* ("PMPA");
>
> (2) certain provisions of S.B. 235 are preempted by the Supremacy Clause of the United States Constitution and the Lanham Act, 15 U.S.C. Section 1121(a), ("Lanham Act");
>
> (3) certain provisions of S.B. 235 violate the Takings Clause of the United States and Virginia Constitutions;
>
> (4) certain provisions of S.B. 235 violate the Contract Clause of the United States and Virginia Constitutions; and/or
>
> (5) certain provisions of S.B. 235 violate the "Special Law" prohibition of the Virginia Constitution.

The seven specific provisions at issue follow:

> (a) Section 59.1-21.11(1), providing that dealers "shall not be required" to keep retail outlets open for more than 16 hours a day, or six days per week ("the no minimum hours provision");

(b) Section 59.1-21.11(6), requiring service station rental agreements to reflect "commercially fair and reasonable standards, uniformly applied to all similarly situated dealers of the same refiner in the same geographic area ("the rent control provision");

(c) Section 59.1-21.11(4), barring petroleum refiners from limiting the number of stations operated by a franchisee-dealer ("the no maximum stations provision");

(d) Section 59.1-21.11(6), requiring renewals of franchise agreements to be a period of at least three years ("the minimum renewal provision");

(e) Section 59.1-21.16:2(C), precluding imposition of "purchase or sales quotas" in its leases and supply contracts ("the no quotas provision");

(f) Section 59.1-21.11(7), forbidding credit card service fees to dealers "in excess of the customary fee charged by credit card services to retailers who authorize use of credit card purchases ("the maximum credit card provision"); and

(g) Section 59.1-21.16:2(A), banning refiners from construction or operating with company personnel any new retail outlets in the Commonwealth, from July 1, 1990 through June 30, 1991, except on certain property purchased or under option to purchase by March 1, 1990 ("the limited

construction provision"). [3]

II.

Both parties have filed motions for summary judgment. The Attorney General has moved for summary judgment on all issues raised. Mobil, however, requests summary judgment only on its PMPA preemption and Special Laws of Virginia claims.

A motion for summary judgment may be granted "only if the pleadings, depositions, interrogatory answers, admissions, and affidavits show 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Magill v. Gulf & Western Indus., Inc.*, 736 F.2d 976, 979 (4th Cir. 1984) (quoting Fed. R. Civ. P. 56(c)); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Where . . . the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *United States v. Lee*, 943 F.2d 366, 368 (4th Cir. 1991) (*citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party moving for summary judgment bears the burden of informing the district court of the absence of a genuine issue of material fact. Any inferences "drawn from the underlying facts contained in the materials before the trial court must be viewed in the light most favorable to the party opposing the motion." *Helm v. Western Maryland*

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[3] Challenges (f) and (g) have been rendered moot subsequent to the filing of Mobil's complaint.

Ry. Co., 838 F.2d 729, 734 (4th Cir. 1988). After the moving party meets its burden, the party opposing the motion must "'set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986) (*quoting* Fed. R. Civ. P. 56(e)); *accord Allstate Financial Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir. 1991).

For the reasons stated below, Mobil's cross motion for summary judgment is GRANTED. Also, the Attorney General's Motion for Summary Judgment is DENIED IN PART and GRANTED IN PART.

III.

(a) Federal Preemption under PMPA and the Supremacy Clause

Mobil moves for summary judgment regarding the five sections of S.B. 235 still at issue. Mobil contends they are preempted under the Supremacy Clause of the United States Constitution and the PMPA. [4] The challenged

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[4] The Supremacy Clause reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

provisions are: (1) the no minimum hours provision; (2) the rent control provision; (3) no maximum stations provision; (4) the minimum renewal provision; and (5) the no quotas provision.

Standards for Preemption

A court should be reluctant to determine that state law is preempted by federal legislation since "'[t]he exercise of federal supremacy is not lightly to be presumed.'" *Tousley v. North Am. Van Lines, Inc.*, 752 F.2d 96, 101 (4th Cir. 1985) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). The Fourth Circuit has noted with approval the succinct statement regarding preemption standards issued by the *Supreme Court in Louisiana Public Service Commission v. FCC*:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress had legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full

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U.S. Const. art. VI, cl. 2.

objectives of Congress.

Jiminez v. BP Oil, Inc., 853 F.2d 268, 271-272 (4th Cir.1988), *cert. denied*, 490 U.S. 1011, *reh'g de*nied, 490 U.S. 1095 (1989) (*quoting Lousiana Public Service Commission v. FCC*, 476 U.S. 355, 368-369 (1986) (citations omitted) ("*Jiminez*").

Legislative History of the PMPA

When considering preemption, this Court must first look to the underlying rationale for the PMPA. The primary purpose is to balance the bargaining power between the franchisor and the franchisee. "Central to the problems faced by franchisees . . . is the disparity of bargaining power which exists between the franchisor and the franchisee. This disparity results in franchise agreements which some franchisees have argued amount to contracts of adhesion." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15 *reprinted in* 1978 U.S. Code Cong. & Ad. News 867.

The United States Court of Appeals for the Fourth Circuit and other courts have acknowledged the other reasons behind the passage of the PMPA. The PMPA established a "single uniform set of rules" to regulate the grounds for termination and nonrenewal of franchises. Thus, the PMPA eliminated the "uneven patchwork of rules governing franchise relationships." Finally, Congress provided franchisors with sufficient flexibility to respond effectively to changing market conditions in a given geographic region. S. Rep. No. 95-731, 95th Cong., 2d Sess. 15 *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 874.

In its motion for summary judgment, defendant emphasizes that the express preemptive clause of the PMPA "is clearly limited to only those provisions governing 'grounds for, procedures for, and notification requirements with respect to termination'" or nonrenewal. The preemption clause of the PMPA reads as follows:

> To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination . . . of any franchise or to the nonrenewal. . . of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.

15 U.S.C. 2806(a).

Legislative history indicates that the preemption clause was intended to have a limited scope.

> To the extent that the provisions of Title I do not apply to an aspect of the franchise relationship, State laws dealing with such aspects of the relationship are not preempted . . . The preemption provisions of the legislation are limited to provisions of State law dealing with termination or non-renewal of franchise relationships.

S. Rep. No. 95-731, 95th Cong., 2d Sess. 15 *reprinted in* 1978 U.S. Code Cong. & Ad. News 900, 901.

Defendant contends that plaintiff improperly applies an analysis of implied preemption under the PMPA. The Attorney General asserts that the above-styled *express* preemption provision precludes such a broad analysis. Specifically, defendant avers that the PMPA grants no rights of termination or nonrenewal to franchisors, but instead limits these rights to certain affirmative defenses under Section 2802(b) or Section 2803. *Winks v. Feeney Oil Co.*, 731 F. Supp. 322, 325 (C.D. Ill. 1990).[5] Defendant also contends that preemption occurs when state law regulates the grounds for termination or nonrenewal of franchises, not when state law merely governs substantive elements or terms of franchise agreements. *See Esso Standard Oil Co. v. Department of Consumer Affairs*, 793 F.2d 431 (1st Cir. 1986) (upholding rent control provision of Puerto Rico statute because it allowed a franchisor to terminate or nonrenew if it did not wish to accept state arbitrating board's rent amount). In summation, defendant states that there is nothing in S.B. 235 which relates to termination or nonrenewal. Its provisions relate to substantive provisions of the franchise relationship. As such, the challenged elements of S.B. 235 are not covered by 15 U.S.C. 2806(a).

However, the Attorney General argues a distinction without a difference. Both sides admit that S.B. 235 was

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[5]While *Winks* does rule that these provisions are affirmative defenses, the United States District Court in Illinois seems to stand alone in so holding.

drafted so that it would invoke the preemption language of Section 2806. Despite the Attorney General's averments regarding preemption, this Court is bound by case law, especially decisions in the Fourth Circuit. Precedent establishes that where the *practical effect* of language governs termination and nonrenewal, it runs afoul of the PMPA.

Substantive Elements

The Attorney General's attempt to rely upon a "substantive elements" arguments stems from existing cases.[6] *Esso, supra*, upheld a Puerto Rican rent control provision as a "substantive element of a franchise agreement." *Esso*, 793 F.2d at 434. The First Circuit did so based on the fact that the franchisor could still terminate if it did not accept a rent established by an arbitrating board. *Id.* If the statute had included a cause of action for franchisees upon termination, the First Circuit would have held the statute preempted. *Id.*

In *Exxon Corp. v. Georgia Assoc. of Petroleum Retailers*, the United States District Court for the Northern

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[6]A District Court in Maryland ruled that if the Maryland General Assembly were to enact a statute which "directly prohibits a franchisor from requiring that a service station be opened longer than a specifically prescribed number of hours, (that statute) arguably would not be pre-empted since it would relate to the "substance" of the franchise agreement." *Vasco v. Mobil Oil Corp.*, 698 F. Supp. 102, 104 (D. Md. 1988). Obviously, such a hypothetical ruling has no binding effect.

District of Georgia ruled that provisions of a Georgia statute explicitly banning termination under certain circumstances were preempted by the PMPA. 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd, Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), *cert. denied, Exxon Corp. v. Georgia Assoc. of Petroleum Retailers*, 454 U.S. 932 (1981). However, the *Exxon* court also ruled that a portion of the statute forbidding distributors from requiring a dealer to operate for more than six days per week or more than twelve hours per day was not preempted.

> The plaintiffs contend that the section is inconsistent with the PMPA because the federal act allows more flexibility to the distributor wishing to terminate a franchise. Plaintiffs apparently envision a suit by a dealer claiming his franchise was terminated because of his refusal to accede to the distributor demand for a [longer] work week . . .
>
> We think plaintiffs overstate the probable application of the section. It deals with the substantive terms of an existing contact, apparently conferring a cause of action upon a dealer anytime a franchise agreement provides for conditions that violate its limitations. Its practical effect is to forbid enforcement of what are deemed oppressive terms of a franchise agreement . . .

Exxon, 484 F. Supp. at 1018.

A court in Connecticut applied Exxon's reasoning when upholding a three-year minimum lease terms provision as a "substantive term" of the agreement to be worked out by the parties themselves or to be regulated by the states. *Lasko v. Consumers Petroleum of Conn., Inc.*,

547 F. Supp. 211, 216-217 (1981).

This Court does not share the sanguine outlook evidenced in *Exxon* and *Lasko* of the "slight, unlikely" possibility of a lawsuit by a dealer whose franchise was terminated on the basis of hours open. This Court instead finds that, as enacted, S.B. 235 largely changes those circumstances under which a franchisor would have the choice to terminate or nonrenew its agreement. The Attorney General simply glosses over the concerns for a "uniform application" to protect against an "uneven patchwork" for the sake of "franchisor flexibility" established by the PMPA and embraced by many courts, including the *Jiminez* decision in the Fourth Circuit. The Virginia General Assembly aptly avoided the preemption-triggering words "termination" and "nonrenewal", but it nonetheless passed legislation whose inevitable outcome, in large part, results in those issues coming to light.

Preemption

In *Jiminez v. BP Oil, Inc.*,[7] the United States Court of Appeals for the Fourth Circuit ruled that BP did not violate PMPA by making a market decision to withdraw completely in a geographic area. However, the Fourth Circuit also ruled that goodwill payments upon termination or nonrenewal required by a Maryland statute were preempted by the PMPA. Franchisee Jiminez argued that

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[7]The *Jiminez* court explicitly rejects the logic used by the Second Circuit to hold that Connecticut's goodwill payments were not preempted by the PMPA. *See Bellmore v. Mobil Oil Corp.*, 783 F.2d 300 (2d Cir. 1986).

such payments were not preempted because they constituted *effects* of termination, and not *grounds* for termination covered by the PMPA. The Jiminez court found such logic unpersuasive. *Jiminez*, 853 F.2d at 272.

Looking to the legislative history of the PMPA, the *Jiminez* court found its breadth greater than that asserted by Mr. Jiminez and, by extension, that averred by the Attorney General and Intervenors in this action. The court emphasized the following aspects of Section 2806(a) of the act:

> . . . no state or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination . . ." Similarly, the Senate Report provides, "The preemption provisions of the legislation are limited to provisions of State law dealing with termination or non-renewal of franchise relationships."

Jiminez, 853 F.2d at 273 (quoting S. Rep., 1978 U.S. Code Cong. & Admin. News at 901) (emphasis in original).

More pertinent to the case at hand, the Fourth Circuit considered the preemptive effect of this language quite broad.

> The breadth of such language in our opinion evinces an intent by Congress to "occupy the field relating to termination and non-renewal of petroleum franchises."

Jiminez, 853 F.2d at 272, *quoting Tousley v. North Am. Van Lines, Inc.*, 752 F.2d at 101.

Reemphasizing this point, the Fourth Circuit continued:

> Arguably, if this court reads the preemption section of the PMPA as narrowly as (other) courts (have), Jiminez might be correct in arguing that the goodwill payment provisions of the Maryland Act might be spared from preemption since it does not govern the "grounds," "procedures", or "notification requirements" for termination. However, a literal reading of the PMPA, as noted above, reveals that it preempts "any provision of any (state) law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination" . . . This language is expressly broader than is the judicial gloss applied by (other courts). The statute, therefore, allows preemption under the instant facts.

Jiminez, 853 F.2d at 272, 237 n. 1 (emphasis in original) (citations omitted).

The *Jiminez* court's reliance upon the legislative language "with respect to termination" and "dealing with" nonrenewal informs the case at hand. Nearly all the provisions of S.B. 235 indirectly "deal with" terms of termination or nonrenewal. Furthermore, most of these sections indirectly deal with "grounds," "procedures," and "notification requirements" of nonrenewal and termination because S.B. 235 restricts the circumstances under which a franchisor would conduct such activity. Congress intended to "occupy the field" of termination and nonrenewal,

meaning that S.B. 235 is clearly preempted.

This Court so rules cognizant that the majority of other statutes which courts have found preempted expressly limited termination criteria. However, the Fourth Circuit binds this Court. Moreover, other decisions have held statutes with provisions parallel to S.B. 235 preempted under the PMPA. The analyses applied by these courts generally give broad interpretation of the PMPA and its legislative purpose, especially the need for a uniform federal law.

In *Darling v. Mobil Oil Corp.*, the Second Circuit held that the PMPA preempted a Connecticut statute providing that hours of operation may not be used as reasonable ground for termination of franchise. 864 F.2d 981 (2d Cir. 1989). In measuring the standard by which to interpret the preemption provision of Section 2806 the *Darling* court states flatly, "[t]he plain meaning of Section 2806(a) requires that a state law whose scope differs from the PMPA be preempted." *Darling*, 864 F.2d 987.

> The PMPA provisions concerning termination and nonrenewal are central to the counterpoise between fairness to franchisees and flexibility for franchisors that Congress established. As Darling tacitly admits in saying that [the Connecticut statute] is more protective than PMPA provisions, the Connecticut Act conflicts with that balance. Consequently, we conclude that Darling's arguments to avoid preemption of the Connecticut law must fail.

The *Darling* court ruled that the federal law regarding termination provided the limits Congress intended, and that

nothing more restrictive could be passed by a state. *Id.* at 988.

Similarly, in *Mobil Oil Corp. v. Karbowski*, a Connecticut federal district court ruled that provisions of a Connecticut statute limiting termination for failure to adhere to a 24 hour operating requirement, as well as a failure to purchase minimum quantities, were preempted by the PMPA. 667 F. Supp. 927 (D. Conn. 1987), *aff'd*, 879 F.2d 1052 (2d Cir. 1989).

Finally, In *Consumers Petroleum Co. v. Texaco, Inc.*, the United States Court of Appeals for the Sixth Circuit held that although fraudulent misrepresentation does not explicitly relate to nonrenewal, it nonetheless resulted in a longer notice requirement:

> On its face, a claim for misrepresentation or fraud does not appear to relate to the nonrenewal or notice requirements of the Act. In our view, however, the claim as it arises in this case has the direct effect of seeking to impose a longer notice requirement upon Texaco than that required under the PMPA.

Consumers Petroleum, 804 F.2d 907, 915 (6th Cir. 1986).

All of these cases rule that the provisions of a franchisor's contract they analyzed were reasonable and of material significance to the franchise. These decisions evaluated statutes whose provisions mirror those of S.B. 235. Therefore, by following the decision of the Fourth Circuit in *Jiminez* and those of other courts, this Court finds that, in large part, S.B. 235 changes the circumstances under which a franchisor may choose to terminate or renew

an agreement.

While the Attorney General would wish this Court to view the effects of S.B. 235 with blinders on, it cannot do so. Clearly, as discussed in *Darling*, S.B. 235 differs in scope from the PMPA. Determinations of minimum hours of operation, maximum number of stations a franchisee may own, minimum number of years for renewal of an agreement and purchase and sales quotas all "deal with" a franchisor's decisions whether or not to end or continue a franchise. These provisions are reasonable and of material significance to the franchise relationship within the meaning of 15 U.S.C. 2802(b)(2)(B). The practical effect of S.B. 235 is to alter the circumstances under which a franchisor may consider its options to terminate or renew. Accordingly, it is preempted by the PMPA, which prohibits state legislation that includes provisions with respect to termination or nonrenewal.

This Court finds, however, that the rent controls section of S.B. 235 goes to the substance of a franchising agreement. A control over rental pricing in a geographic area does not implicate termination or renewal. As such, the PMPA does not preempt the rent control provision in Section 59.1-21.11(6) of S.B. 235.

(b) Federal Preemption under the Lanham Act and the Supremacy Clause

Mobil challenges three subsections of S.B. 235 as violative of Mobil's trademarks under the Lanham Act: (1) the no maximum stations provision; (2) the no quotas provision; and, (3) the no minimum hours provision.

First, Mobil claims that S.B. 235 is inconsistent with the purpose of the Lanham Act because it impairs Mobil's ability to control the quality and uniformity associated with its trademarks. Second, Mobil contends that the "no quotas" provisions of S.B. 235 is preempted by 15 U.S.C. 1121. The marks involved in this lawsuit are the word "Mobil" in colored letters and, simply, the word "Mobil." This lawsuit also concerns the word "Pegasus" over a flying horse, which Mobil uses when labelling its petroleum and petroleum products. The Attorney General seeks summary judgment on this issue.

Standards of Preemption

The express preemption provision of the Lanham Act reads as follows:

> No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

15 U.S.C. 1121(b).

Generally, preemption under the Lanham Act occurs under express preemption by Congress or when there exists

an incongruity between state and federal law. *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 857 (3d Cir. 1975). The Fourth Circuit applies a presumption against preemption when Congress does not state its intent. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988). As discussed above, a court may look to legislative history to determine preemptive effect. *Id.* at 1114.

Purpose of Lanham Act

The Senate Report accompanying the Lanham Act outlines the Act's general purpose:

> The purpose underlying any Trademark statute is twofold. One is to protect the public so it may be confident that . . . it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in this investment from its misappropriation by pirates and cheats.

Mariniello v. Shell Oil Co., 511 F.2d 853 (3d Cir. 1975), *quoting* S. Rep. No. 1333, 79th Cong., 2d Sess., in 1946 U.S. Code Cong. Serv. 1274.

Mobil emphasizes the second purpose. The Attorney General rebuts that there are other, better means of protection available to Mobil. This Court finds the Attorney General's argument persuasive on the matter.

While Congress intended to regulate matters such as the appearance of a mark or the right to prevent others from

using it, Congress did not intend to regulate non-trademark matters such as business practices of industries in which marks may be used. States have the power to regulate the content and interpretation of contracts, including trademark licensing agreements. *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 858 (3d Cir. 1975). [8]

A House Report emphasizes that, as is the preemptive clause in PMPA, the scope of preemption under the Lanham Act is limited:

> [Section 1121(b)] in no way restricts the rights of states to otherwise regulate the activities of franchise realtors. To make the limited scope of the bill clear the Committee adopted amendments, recommended by the Patent and Trademark Office, to make it clear that restriction on a state's power is limited to the display of the franchisee's name 'in the mark' itself and not to other uses of trademarks in advertising.

House Rep. No. 97-778, *reprinted in* U.S. Code Cong. & Ad. News 2621, 2622-2623.

S.B. 235 regulates terms and conditions, and not any exclusive right to use or authorize use of Mobil's marks. While a mark indicates some sort of quality control over the goods or services identified under it, *see* 15 U.S.C. 1127, Mobil improperly asserts that quality control as a

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[8] In *Mariniello*, the Third Circuit ruled that the New Jersey common law protecting franchisees from termination of a franchise agreement without cause was not invalid, under the supremacy clause, by reason of the Lanham Act. *Mariniello*, 511 F.2d at 857-858.

determinative issue under the Lanham Act. Mobil has other means by which to control quality, and S.B. 235 does not prevent its doing so. Thus, even reading the facts in the light most favorable to Mobil, Mobil unsuccessfully argues its case with respect to all provisions of S.B. 235 challenged under the Lanham Act.

The validity of the "No Maximum Stations Provision" stems from the fact that Mobil allows salaried employees to operate a significant percentage of its stations, rendering Mobil's argument with respect to a franchisee hiring salaried personnel weak. Regarding the "No Quotas" provision, other enforcement tools for preventing misbranding, such as chemical testing and inspection, are available to Mobil. More basic, however, is the fact that the "No Quotas" provision does not require Mobil to alter the appearance of any of Mobil's marks or to display any other mark or name "in" any Mobil mark. Accordingly, the "No Quotas" provision does not fall under the Section 1121 express preemption provision of the Lanham Act.

Finally, with respect to the "No Minimum Hours" provision, Mobil asserts that 24-hour operation is part of its trademark image. However, Mobil's attempt to challenge this through the Lanham Act is misguided. This Court finds unpersuasive that Mobil's trademark might be damaged when Mobil itself does not apply this requirement uniformly. Therefore, a state statute limiting hours of operation cannot significantly lower the trademark image.

For the reasons stated above, this Court GRANTS defendant's motion for summary judgment with regard to all Lanham Act claims brought by plaintiff.

(c) Contract Clause Issues

Mobil invokes both the Federal and the Virginia contract clauses in this claim. The United States provision reads in relevant part: "No State shall. . . pass any . . . law impairing the obligation of contracts." U.S. Const. art. I, Section 10. The Virginia provision is nearly identical: ". . . the General Assembly shall not pass any law impairing the obligation of contracts." Va. Const. art. 1, Section 11.

Courts recognize that all contracts are made subject to the state's police power. Despite the absolute nature of the language of the Contracts clause, it is not "the Draconian provision that its words might imply." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240, *reh'g denied*, 439 U.S. 886 (1978) (*quoting W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934). Mr. Justice Holmes first stated, regarding contract rights and obligations the following:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject-matter.

Allied, 438 U.S. at 241-242 (*quoting Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908)).

Substantive Contract Clause Claims

A state may enact legislation which substantially impairs contractual obligations if the legislation reasonably serves a legitimate state interest. *See Allied Structual Steel*

Co. v. Spannus, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25, *reh'g denied*, 431 U.S. 975 (1977). [9] Courts must make a two-part determination: (1) substantial impairment; [10] and (2) whether such impairment serves a legitimate state interest. [11] This analysis may include consideration of how heavily regulated an industry is when applied. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 and 413 (1983).

This Court finds that as passed, S.B. 235 does not substantially impair contract obligations at a constitutional level. Any alteration of contract rights is minimal. First,

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[9] This Court sees no reason to address the issue of retroactivity of S.B. 235. This Court finds persuasive the comment regarding this issue made by the Fourth Circuit. *Mobil Oil Corp. v. Attorney Gen. of Virginia*, 940 F.2d 73, 77 (4th Cir. 1991) ("We find no explicit limitation to future renewals. Even if it be so restricted, Mobil's injury is just deferred; it is still inevitable.").

[10] In *Allied Structural Steel v. Spannus*, the Supreme Court ruled that a finding of minimal alteration of contractual obligations "may end the inquiry." 438 U.S. at 245.

[11] This review process is laid out by the Supreme Court in its *Allied Structural Steel* decision, *supra*. The Supreme Court of Virginia applies the same Contract Clause analysis as does the United States Supreme Court. *See Working Waterman's Assoc. v. Seafood Harvesters, Inc.*, 314 S.E. 2d 159, 163-165 (Va. 1984).

since the "No Quotas" provision merely prohibits Mobil from demanding that a dealer buy more fuel than he or she can reasonably resell, it does not substantially impair Mobil's right to contract. Even if it did more than minimally alter the contractual rights, a "No Quotas" provision is justified by the Commonwealth's interest in protecting consumers from higher motor fuel prices. *See* Virginia Petroleum Products Franchise Act, Va. Code Section 59.1-21.8 at 59.1-21.9 (". . . the distribution and sales through franchise agreements of petroleum products in the Commonwealth of Virginia vitally affects the economy of the Commonwealth, the public interest, welfare, and transportation . . .").

Second, the "No Maximum Stations" provision does not amount to a substantial impairment because some dealers already elect to operate under a SALOP program established by Mobil itself. Even if this did alter Mobil's contractual obligations, the Commonwealth could determine legitimately that other factors, such as the advantages of encouraging economies of scale, are legitimate state concerns worthy of public backing.

Third, the three year limit under the "Minimal Renewal" provision may enhance the economic viability of the independent dealers by providing them the security of substantial lease terms and protecting them from discriminatory rental provisions. Any harm to Mobil simply does not rise to a substantial impairment.

Finally, the "No Minimum Hours" provision does not substantially impair Mobil's contracts because it simply eliminates a floor: if a station is profitable 24 hours per day, seven days a week, it may remain open for those

hours. Also, even if that provision did rise to a level of substantial impairment, the public has an interest in the creation of an economic and safe workplace. Therefore, under S.B. 235 if a station cannot earn a profit or remain safe 24 hours per day, an owner may close it for some part of the day. [12]

Thus, under no reading of the facts has Mobil established its claim. For the reasons stated above, this Court hereby GRANTS defendant's motion for summary judgment with regard to all contracts clause challenges brought by Mobil.

(d) "Takings" under the Federal Constitution

The pertinent part of the Fifth Amendment of the United States Constitution reads: "nor shall private property be taken for public use, without just compensation." This provision applies to the states via the Fourteenth Amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122, *reh'g denied*, 439 U.S. 883 (1978). When a court examines a governmental action for a Taking it first looks to the character of the action, and then to the economic impact of that action on the property owner.

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[12] Mobil also challenged the "Below Cost Credit Card" provision under the Contract Clause. The 1991 amendment to subdivision 7 deleted the "Below Cost Credit Card" provision. The issue of the original subsection's constitutionality is moot.

In its Complaint, Mobil has outlined its investment in service stations in Virginia. It alleges that its minimum volumes requirements, its national hours policy and its rental provisions are designed to ensure Mobil's recovery of this investment.

Mobil contends that under the current Supreme Court standard, a statute may so interfere with "reasonable investment-backed expectations" that it constitutes a taking. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Via expert testimony, Mobil sought to establish that the no quotas and no maximum hours provisions have already diminished the value of Mobil's investment in Virginia by $3 million, and that further harm has been suffered. Mobil asserts that this taking violates the Constitution because it is for private, and not public, use. *Phillips v. Foster*, 211S.E. 2d 93 (Va. 1975). Finally, Mobil avers that this taking occurred without just compensation.

Again, this Court is unswayed by Mobil's arguments. First, Mobil offers no statistical information which could conceivably buttress allegations of losses amounting to improper takings. While Mobil advances its intent to prove in more detail such losses at trial, the affidavits and testimony before this Court could not, under any set of circumstances, lead a reasonable trier of fact to determine that a taking has occurred. More important, however, is that even if more losses than those estimated were factually proven, a "Taking" does not occur when a business is subjected to some future loss because of a legislative provision.

> Suffice it to say that government regulation -- by definition -- involves the adjustment of rights for the

> public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase . . .the denial of one traditional property right does not always amount to a taking. At least where an owner possess a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Andrus v. Allard, 444 U.S. 51, 65 (1979).

The Virginia General Assembly passed legislation which weighed the rights of individual owners in a manner Mobil would not have. Such a decision, while contrary to Mobil's desires, fully complies with the "justice and fairness" criteria expressed by the Supreme Court in *Penn Central Transportation Co. v. New York City*. 438 U.S. at 124.

For the reasons stated above, this Court GRANTS defendant's motion for summary judgment on Mobil's claims regarding unfair takings.

(e) Special Laws Prohibition of Art. IV, Sections 14 and 15 of the Virginia Constitution

Finally, Mobil asserts that S.B. 235 violates the Special Las prohibition of the Virginia Constitution. The Attorney General seeks summary judgment on this issue. Mobil has filed a cross motion for summary judgment.

The essence of the Special Laws provision, which aims primarily at economic legislation, is to prevent the General Assembly from enacting laws that improperly benefit one class of people over another. The constitutional prohibitions, first adopted in the Constitution of 1902, were enacted "to correct the perception that the General Assembly, in the nineteenth century, devoted an excessive amount of its time to the furtherance of private interests." *Holly Hill Farm Corp. v. Rowe*, 404 S.E. 2d 48, 50 (Va. 1991) (*quoting Benderson Development Co. v. Sciortino*, 372 S.E. 2d 751, 756 (Va. 1988)). The validity of a statute under the Special Laws provision depends on the actual "purpose and subject of the particular act and the circumstances and conditions surrounding its passage." *Etheridge v. Medical Center Hospitals*, 376 S.E. 2d 525 (Va. 1989); *Joyner v. Centre Motor Co.*, 66 S.E. 2d 469, 472 (Va. 1951).

Two sections of the Virginia Constitution are involved in the present challenge. First, article IV, Section 14, cl. 12 and 18 of the Virginia Constitution provide, in part, that:

> [t]he General Assembly shall not enact any local, special or private law . . . regulating labor, trade mining, or manufacturing . . .granting to any private corporation, association, or individual any special or exclusive right privilege, or immunity.

Va. Const. art. IV, Section 14, p. 18.

Second, article IV, Section 15 of the Virginia Constitution states in relevant part that:

> In all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws . . .
> . . .No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law's operation be suspended for the benefit of any private corporation, association, or individual.

Va. Const. art. IV, Section 15.

Virginia courts are nearly universal in defining a special law in the following manner:

> A law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places, or things from those upon which, but for such operation, it would operate. . . The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes.

Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 79-80, *pet. refused*, 126 Va. 622 (Va. 1920).

Mobil alleges that it has been arbitrarily separated from other refiners in violation of this Constitutional provision. In fact, the Attorney General concedes that S.B. 235 pertains to less than 20 percent of Virginia's 5,278 retail outlets for the sale of motor fuel.

In support of S.B. 235, the Attorney General asserts that the special law prohibition does not prevent legislative classifications altogether. Indeed, a provision is presumed constitutional and the challenger bears the burden of proving its special law status. The Attorney General avers that S.B. 235 allows "natural and reasonable" classifications "appropriate to the occasion." *Fredericksburg Auto Auction v. DMV*, 406 S.E. 2d 23, 27 (1991) (citations omitted). Defendant notes that the General Assembly enacted S.B. 235 in order to preserve the independence of small businesses subject to PMPA franchise agreements.

However, the *Fredericksburg* case does not support the contention that S.B. 235 is not special legislation. Defendant merely cites the standards by which special legislation is measured, which are adequately laid out in the *Fredericksburg* decision.

In *Fredericksburg Auto Auction v. Department of Motor Vehicles*, Virginia and out-of-state automobile auctioneers challenged the constitutionality of amendments to a Virginia law instituting changes in licensing of automobile dealers. The two amendments required that all out of state auctioneers register with the Division of Motor Vehicles ("DMV") and required a fee from all auctioneers (Virginian and non-Virginian) to create a fund protecting consumers from fraudulent auto sales at auctions. Among the dealers' challenges was a claim that the law violated the special laws provision of the Virginia Constitution. The Virginia Supreme Court ruled against them, holding that the amendments involved a reasonable classification:

> [T]he [amendments] apply without discrimination to all who sell motor vehicles in the regular course of

> business at wholesale auctions throughout the state. The legislative purpose was to provide uniformity in the regulation of wholesale motor vehicle auctions, for the protection of purchasers against fraud practiced by motor vehicle dealers.

Fredericksburg Auto Auction v. DMV, 406 S.E. 2d 753.

The amendments at issue in *Fredericksburg* applied evenly to all auctioneers. S.B. 235, on the other hand, effects only a small subgroup of gasoline retailers.

The Virginia Supreme Court's decision in *Benderson Development Co. v. Sciortino*, 372 S.E. 2d 751 (Va. 1988), speaks more to the case at hand than does *Fredericksburg*. In that decision, the Virginia Supreme Court notes that the Special Laws provisions are "aimed squarely at economic favoritism." *Benderson*, 372 S.E. 2d at 756.

Benderson involved a constitutional challenge to Virginia Sunday Closing laws. First, the Virginia Supreme Court stated the standards by which constitutional challenges are measured:

> [T]he constitutional provisions against special legislation do not prohibit legislative classification, but do require that classifications be "natural and reasonable, and appropriate to the occasion . . ." When a statute is challenged under the special legislation prohibition, we must determine whether the act makes an "arbitrary separation", and for this we must look to the purpose of the act, as well as the circumstances and conditions existing at the time of its passage. . . There is a strong presumption in

> favor of the reasonableness of legislative classifications, and if any state of facts can be reasonably conceived which would support them, the existence of that state of facts at the time of passage must be assumed.
>
> ***
>
> [T]he test for statutes challenged under the special laws prohibitions in the Virginia Constitution is that they must bear "a reasonable and substantial relation to the object sought to be accomplished by the legislation."

Benderson, 372 S.E. 2d at 753, 757 (citations omitted) (emphasis supplied).

The Virginia Supreme Court next looked to the Sunday Closing Laws, finding them unconstitutional.

Following the analysis laid out in *Benderson*, it is obvious to this Court that S.B. 235 also violates the special laws prohibition of the Virginia Constitution. First, S.B. 235 does not "affec[t] all persons similarly situated or engaged in the same business throughout the State without discrimination." *Benderson*, 372 SE. 2d at 757. There is no "natural and reasonable" distinction between a Mobil station that leases to a franchisor, a Crown station operated by Crown itself, a Texaco station operated by a "jobber", and a convenience store that leases its premises to a Citgo.

Yet under S.B. 235, only the Mobil station is covered. [13]

The final aspect of the *Benderson* analysis directly addresses concerns applicable to S.B. 235. The Virginia Supreme Court found the Sunday closing laws unconstitutional in large part because they covered only 20 percent of the employed persons in the Commonwealth.

> Finally and crucially, we must inquire: does the statutory scheme, as applied, bear a "reasonable and substantial relationship to the object sought to be accomplished by the legislation? . . .
> Plainly, the answer is no. The statute covers only about 20% of the employed persons in the Commonwealth.

Benderson, 372 S.E. 2d at 757.

Senate Bill 235 targets less than 20 percent of Virginia's 5,278 retail outlets for the sale of motor fuel. Most of those retailers average incomes of more than $100,000 annually. This Court sees no natural and reasonable distinction upon which the General Assembly could have relied.

Another Virginia Supreme Court decision held a similar classification unconstitutional. In *Joyner v. Centre Motor Co.*, the Court ruled that a statute requiring a motor

---

[13] The second stage of the *Benderson* analysis, whether the exemptions confine themselves to "works of necessity under the modern day conception of things," speaks more to Sunday closing laws than it does to franchising arrangements.

vehicle dealer to enter into a franchising agreement before receiving a state license to sell "foster[ed] and protect[ed] the commercial interests of the enfranchised dealers but the classification is unnatural and unreasonable" for purposes of the special laws provision. *Joyner*, 60 S.E. 2d 469, 474 (Va. 1951).

While the Attorney General claims that Virginia specifically attempted to address the relationship between large refiners like Mobil and those with whom it deals, such a delineation seems just the sort of arbitrary standard that the Special Laws provision intended to address. Just because the General Assembly meant to target a discreet group via S.B. 235 does not mean it is constitutionally allowed to do so. Reading the facts in the light most favorable to the Attorney General, this Court finds that S.B. 235 protects a discrete group of franchisees represented by VGMARA rather than the universe of underdog, outgunned franchisees which the Attorney General avers it addresses.

For these reasons, this Court hereby GRANTS Mobil's cross motion for summary judgment regarding its claim that S.B. 235 violates the Special Laws provision of the Virginia Constitution. The Attorney General's motion for summary judgment on that same issue is accordingly DENIED.

And it is so ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: 1 Sep 1992

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

MOBIL OIL CORPORATION,

Plaintiff-Appellee,

v.

VIRGINIA GASOLINE MARKETERS AND AUTOMOTIVE REPAIR ASSOCIATION, INCORPORATED,

Defendant-Appellant,

and

ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES OF VIRGINIA,

Defendants.

MINNESOTA SERVICE STATION ASSOCIATION; IOWA RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; WISCONSIN RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS OF AMERICA,

Amici Curiae.

No. 92-2242
No. 92-2244
No. 92-2256

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Virginia Gasoline Marketers and the Attorney General of the Commonwealth of Virginia filed petitions for rehearing with suggestion for rehearing in banc.

Judge Ervin voted to grant panel rehearing. Judges Chapman and Hall voted to deny.

No member of the Court requested a poll on the suggestion for rehearing in banc.

WMDP Service Station and Automotive Repair Association filed a motion for leave to file an amicus brief in support of the Attorney General's petition for rehearing. The Court denies the motion.

Service Station Dealers of America, Minnesota Service Station Association; Iowa Retail Gasoline and Automotive Trades Association; North Dakota Petroleum Marketers Association; Service Station Dealers Association of Michigan; and Wisconsin Retail Gasoline and Automotive Trades filed a joint motion for leave to file an amicus brief in support of rehearing and suggestion for rehearing in banc. The Court denies the motion.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman for the Court.

For the Court,

/s/ Bert M. Montague
CLERK

FILED: September 6, 1994.

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FASI M. FILIAGA,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 89-4098
	)	(D.C.No.88-NC-096S)
CHEVRON U.S.A., INC.	)	(D. Utah)
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT*

Before TACHA, SETH, Circuit Judges, and BROWN, ** District Judge.

**Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

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* This order and judgment has no precendential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

This case comes to us on appeal of summary judgment entered in favor of defendant Chevron U.S.A., Inc. Plaintiff Fasi Filiaga claims that Chevron violated the provisions of Title I of the Petroleum Marketing Practices Act, 15 U.S.C. 2801-2806 (1982) (the PMPA or the Act), when it did not renew its five year old franchise with Filiaga. We reverse and remand to the district court for further proceedings.

Filiaga asserts that Chevron's marketing agent made negligent representations to Filiaga and to a loan officer of the Small Business Administration (SBA) before Filiaga entered the franchise relationship. The agent allegedly told Filiaga and the SBA that the franchise would continue to be renewed to at least ten years' duration. Allegedly on the basis of these representations, Filiaga applied for and was granted a $45,000.00 SBA loan, secured by his home, other real property, his car and all his personal property. Filiaga argued below and reasserts here that Chevron's agent's negligent misrepresentations should estop chevron from asserting compliance with the PMPA as a total defense.

Chevron counters this claim by asserting that compliance with the PMPA preempts all common law claims and theories tangential to the termination or nonrenewal of a franchise, including equitable estoppel. Chevron maintains that it did not violate any of the provisions of the PMPA when it notified Filiaga of its decision not to renew his franchise at the expiration of the ground lease underlying the franchise. Chevron's defense relies on two provisions of the PMPA: (1) section 2802(c)(4), which specifically acknowledges that loss of the underlying ground lease by the franchisor is a legitimate reason to terminate or decline renewal; and (2) section 2804, which sets forth an explicit notice procedure. The

district court, acting upon a magistrate's recommendation, agreed with Chevron and entered summary judgment in its favor.

We review this grant of a motion for summary judgment under the same standard employed by the trial court:

> Under Rule 56(c), summary judgment is proper only if it is apparent from the record that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment, and the court must review the record in the light most favorable to the opposing party.

Ewing v. Amoco Oil Company, 823 F.2d 1432, 1437 (10th Cir. 1987).

The parties do not dispute the facts underlying Chevron's stated rationale for abandoning the franchise or the notification procedure which Chevron utilized. The term of Filiaga's first Dealer Lease and Dealer Supply Agreement was June 1, 1983, through May 31, 1986 (the first agreement). This agreement was renewed by another Dealer Lease and Dealer Supply Agreement which expired June 30, 1988 (the second agreement), the date on which Chevron's ground lease expired. Although Chevron had an option to renew the ground lease for an additional ten years, it chose not to do so, allegedly because of the age of the building, the market share of retail gasoline sales in the franchise's geographical area, and Chevron's long range

retail marketing plans for the area. [1] Both the first and the second agreements expressly stated that Chevron had the right to terminate the agreements, subject to notice provisions, if its underlying ground lease terminated. The second agreement was also accompanied by a letter dated January 20, 1986, which informed Filiaga that the ground lease for his station expired June 30, 1988. Subsequently, on February 2, 1988, Filiaga received written notification of Chevron's intent not to renew his franchise agreement and the reason for nonrenewal. All of these actions were conducted pursuant to and in compliance with the PMPA's franchise nonrenewal provisions.

However, we disagree with the district court's decision that there is no merit in Filiaga's argument that equitable estoppel prevents a franchisor from claiming a complete defense through compliance with the PMPA. While Chevron relies on section 2806 of the Act for authority that Filiaga's estoppel claim is preempted, other courts have gone beyond the PMPA when warranted by equitable considerations. *See Wesley v. Mobil Oil Corp.*, 513 F. Supp. 227, 230-31 (E.D. Pa. 1981); *cf. Baldauf v. Amoco Oil Co.*, 553 F. Supp. 408, 417 (W.D. Mich. 1981), *aff'd*, 700 F.2d 326 (6th Cir. 1983) (examining promissory estoppel claim but rejecting it under the facts of the case); *Wojciechowski v. Amoco Oil Company*, 483 F. Supp. 109, 115 (E.D. Wis. 1980) (same).

---

[1]Merely having an option to renew an underlying ground lease does not obligate the franchisor to do so. *See Lugar v. Texaco, Inc.*, 755 F.2d 53, 56 (3d Cir. 1985); S. Rep. No. 731, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 896.

This Circuit has articulated the intent of Congress in the PMPA when we stated in *Ewing v. Amoco Oil*:

> [O]ne of Congress' primary purposes in enacting the PMPA was to protect franchisees against arbitrary and discriminatory terminations or nonrenewals. A longstanding franchisee has a legitimate expectation that the franchise relationship will be a continuing one. The statute is thus directed in part at "protecting the buildup of goodwill by those individuals who have invested time and money into the operation of a franchise."

823 F.2d at 1438 (quoting *Brewer v. Exxon Corp.*, 626 F. Supp. 76, 79 (E.D. Tenn. 1985). *See also Sandlin v. Texaco Refining & Marketing Inc.*, 900 F.2d 1479, 1480-81 (10th Cir. 1990).

The legislative history of the Act supports the view that equitable estoppel should be considered even in the face of compliance with the Act. For example, the Senate report states:

> [O]ften the reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one. This expectation by the franchisee, in particular, is often the result of, and fostered by, statements and actions of the franchisor. As a result, non-renewal of a motor fuel franchise relationship at the expiration of its term can be almost as punitive as termination of the franchise during its term. The reasonable expectations of the franchisee, rather than any definitive contract rights, are destroyed.

S. Rep. No. 731, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 876 (the Senate report). It would be anomalous for us to interpret the statute as preempting equitable protection from this very destruction of reasonable expectation. Furthermore, the legislative history goes on to state:

> It is clear that no single statutory principle would be flexible enough to deal with so wide a range of potential conflicts. Therefore, the [PMPA] leaves to the courts the task of resorting to traditional principles of equity to maximize attainment of the competing statutory objectives consistently with the supremacy clause of the Constitution and the purposes of the Federal legislation.

Senate report at 901 (commenting on PMPA Section 2806).

We are persuaded that compliance with the provisions of the PMPA was not intended by Congress to insulate the franchisor from equitable considerations and therefore hold that the district court must examine Filiaga's claim of equitable estoppel.

In granting summary judgment in favor of Chevron, the district court acknowledged that there are disputed issues of material fact relating to Filiaga's claim of equitable estoppel. Although that court described these disputes as "frail", nevertheless, they also render summary judgment inappropriate because, taken in light most favorable to Filiaga, they present material issues for resolution by the trier of fact.

Filiaga asserts in his Complaint and his affidavit that,

before Filiaga entered into the first agreement, George Fotes, a marketing representative of Chevron, assured Filiaga in the presence of Filiaga's wife that Chevron would renew the franchise documents to accommodate a franchise arrangement of at lease ten years' duration. Relying on this information, Filiaga applied for a $45,000 loan from the SBA. The SBA would not approve the loan for a franchise of less than a ten-year duration. In his answers to interrogatories, Filiaga listed Allen Ferre, the SBA loan officer who handled Filiaga's loan, as a witness, stating that Ferre would testify that while he had no recollection of a particular communication with a Chevron representative, he would not ordinarily have approved a ten-year loan on a three-year lease without confirmation of the franchisor's commitment to a ten-year franchise relationship. Filiaga also testified in deposition that he called Fotes to request that Fotes contact the SBA to give it the necessary assurance. The SBA called Filiaga to notify him of approval of his loan within a day or two after Filiaga called Fotes.

Fotes disputes Filiaga's account of their instructions. Instead, Fotes stated in his affidavit that he informed Filiaga that the dealership would be discontinued if Chevron did not renew the ground lease and that nonrenewal was a possibility. Fotes also denies assuring Filiaga or any other entity or person that Filiaga would be granted any particular tenure in the subject property beyond the expiration of the initial ground lease term in 1988.

According to the deposition testimony of the regional retail manager in charge of Filiaga's franchise area, the particular regional marketing analysis which dictated Chevron's abandonment of Filiaga's station was not begun

until a year after the first agreement was executed. At the time Filiaga and Chevron entered the first agreement, Chevron's long-term marketing plans were made on the basis of each individual location's performance rather than larger geographic area market analysis. However, this same supervisor stated that even under the previous station-by-station long range planning, there had been inferences in the file that it was probably not a long-term site.

The record also reveals that Filiaga attempted to purchase the property and improvements prior to expiration of the ground lease, but was unsuccessful in his attempts to do so. Chevron first quoted a "ballpark estimate" of $100,675 for the purchase of the improvements on the property, a price sufficiently high that it prohibited Filiaga from obtaining financing. Later Chevron amended that purchase price down to $36,000, but by that time, still prior to his receipt of the ninety-day notification, another party, whom Filiaga claims was another Chevron dealer, had allegedly obtained an option to purchase or lease the underlying property. chevron denies any association with this third party in conjunction with the property prior to the expiration of Chevron's ground lease on June 30, 1988.

This brief recitation of disputed facts from the district court record of the parties' preliminary discovery, truncated by the order granting summary judgment, indicates that this case is not appropriate for summary judgment. While we express no opinion as to the eventual outcome of the case, there are several significant issues which await resolution by the trier of fact.

The judgment of the United States District Court for the District of Utah is REVERSED and REMANDED for

further proceedings consistent with this opinion.

ENTERED FOR THE COURT
PER CURIAM

FILED: July 20, 1990.

Supreme Court, U.S.
FILED
JAN 23 1995
OFFICE OF THE CLERK

No. 94-1000

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VIRGINIA GASOLINE MARKETERS &
AUTOMOTIVE REPAIR ASSOCIATION, INC.,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Did the court of appeals err in holding that a Virginia law depriving certain petroleum franchisors of a right to termination or nonrenewal granted them under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801 *et seq.*, is preempted by the express preemption provision of the PMPA, which prohibits state laws or regulations "with respect to termination" that are not "the same as" the law with respect to termination under the PMPA?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, respondent Mobil Oil Corporation states that it is a wholly owned subsidiary of Mobil Corporation. Mobil Oil Corporation has the following nonwholly owned subsidiaries:

Atas Anadolu Tasfiyehanesi A.S.
Canner's Steam Company, Inc.
Collins Pipeline Company
Felix Oil Company
Mobil Oil De Mexico, S.A. De C.V.
Mobil Oil Del Peru (Compania Comercial) S.A.
Mobil Oil Guinee
Mobil Oil Mauritanie
Mobil Oil Nigeria Public Limited Company
Mobil Tunisie
Near East Development Corporation
T&M Terminal Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1000

VIRGINIA GASOLINE MARKETERS & AUTOMOTIVE REPAIR ASSOCIATION, INC.,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The petition filed by the Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), which is the sole petitioner following the Virginia Attorney General's decision not to seek certiorari, omits several important facts. At issue in this case is the validity of certain provisions of the so-called "S.B. 235" amendments to the Virginia Petroleum Products Franchise Act, Va. Code § 59.1-21 *et seq.* Respondent Mobil Oil Corporation ("Mobil") filed a declaratory judgment action against the Attorney General of Virginia before the July 1, 1990 effective date of the state statute. Mobil contended, *inter alia*, that certain provisions of S.B. 235 were invalid under the express preemption section of the federal Petroleum Marketing Practices Act, 15 U.S.C.

§ 2801 *et seq.* ("PMPA").[1] VGMARA, the trade association and lobbying representative for gasoline dealer interests in Virginia, intervened to defend the statute and the advantages it bestowed on VGMARA members.

The provisions of S.B. 235 that Mobil contended conflicted with the PMPA were the following regulations of petroleum franchise agreements in Virginia:

1. the "No Quotas Provision," which prohibited refiners from requiring any dealer to meet motor

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[1] The PMPA was recently amended by the Petroleum Marketing Practices Act Amendments of 1994, Pub. L. No. 103-371, 108 Stat. 3484. Petitioner has failed to meet its obligation to inform the Court of the Amendments, as have *amici* WMDP Service Station and Automotive Repair Association, *et al.* ("*Amici*"). *See, e.g., Fusai v. Steinberg*, 419 U.S. 379, 387 n.12, 390 (1975) (counsel have duty promptly to disclose any change in statute under review). Indeed, *Amici* premise their argument for review on lower court disagreement over a part of the statute (not at issue here) that was explicitly altered by the Amendments. *See infra* at 14.

It is Mobil's position that the Amendments' changes to the PMPA, which are not at issue here, provide no independent ground for denial of certiorari because they do not alter PMPA preemption analysis as applied in this case. *See* S. Rep. No. 103-387, 103d Cong., 2d Sess. 2, 5 ("The Committee wishes to stress that, except for the provisions contained in section 5 regarding goodwill and transfer of the franchise upon the death of the franchisee, the bill has no effect on federal preemption as provided in the 1978 Act."); H.R. Rep. No. 737, 103d Cong., 2d Sess. 4-5, reprinted in 1994 U.S.C.C.A.N. 2779, 2782 (under amendments States still may not "in any way regulate the grounds for termination or nonrenewal of a franchise . . . unless the State statute is exactly the same as the provisions of PMPA Title I").

The Court should be aware, however, that several dealer associations have publicly taken the position that the Amendments alter preemption analysis, including the Fourth Circuit's result here. The silence of VGMARA and *Amici* appears to indicate agreement with Mobil's view that the Amendments have not altered PMPA preemption analysis. If this is not the case, VGMARA and *Amici* should candidly disclose that they are asking the Court needlessly to commit its resources to reviewing a statutory scheme they believe has been changed by subsequent legislation.

fuel "purchase or sales quotas," Va. Code § 59.1-21.16:2(C);

2. the "No Minimum Hours Provision," which prohibited refiners from requiring any dealer "to keep his retail outlet open for business for more than sixteen consecutive hours per day, nor more than six days per week," with the exception of "retail outlets which participate in the travel services signing program of the Virginia Department of Taxation," *id.* § 59.1-21.11:1;

3. the "Rent Control Provision," which required refiners to charge rents "based on commercially fair and reasonable standards, uniformly applied to all similarly situated dealers of the same refiner in the same geographic area," *id.* § 59.1-21.11:6;

4. the "Minimum Renewal Provision," which required that all franchise renewals "shall not be for less than three years," *id.*; and

5. the "No Maximum Stations Provision," which prohibited refiners from limiting the number of stations the refiner may decide to lease to a single dealer, *Id.* § 59.1-21.11:4.

S.B. 235 also created a private civil remedy for VPPFA violations, including a $2500 liquidated damages penalty plus actual damages and attorneys' fees. *Id.* § 59.1-21.2. In addition, the Attorney General was given statutory authority to investigate and bring actions for violations of the statute. *Id.* § 59.1-68.2.

In the courts below, Mobil has consistently relied upon the express preemption provision of the PMPA, which provides that

> no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any penalty or remedy applicable to any violation thereof) *with respect to* termination . . . of any franchise or to the nonrenewal . . . of any such franchise relationship unless

> the provision of such law or regulation *is the same as* the applicable provision of this title.

15 U.S.C. § 2806(a) (emphasis added). The foregoing preemption provision reflected congressional intent to eliminate the "uneven patchwork of rules governing franchise relationships which differ from State to State." S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S.C.C.A.N. 873, 877. In place of this "uneven patchwork," Congress substituted

> *a single, uniform set of rules* governing the *grounds* for termination and nonrenewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non-renewal of a franchise relationship.

Id. (emphasis added).

The PMPA contains a number of provisions that "apply to" termination and nonrenewal within the meaning of 15 U.S.C. § 2806(a). These provisions allow a franchisor such as Mobil to terminate (or fail to renew) a franchise for any of the following reasons:

- "failure by the franchisee to comply with any provision of the franchise, which provision is both *reasonable* and of *material significance* to the franchise relationship," 15 U.S.C. § 2802(b)(2)(A) (emphasis added);
- "failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise," 15 U.S.C. § 2802(b)(2)(B); and
- "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable." 15 U.S.C. § 2802(b)(2)(C). Such events include "loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease." 15 U.S.C. § 2802(c)(4).

The PMPA also allows nonrenewal for certain additional specified reasons, including:

> *failure* of the franchisor and the franchisee *to agree to changes* or additions to the provisions of the franchise, if—
>
> (i) such changes or additions are *the result of determinations made by the franchisor in good faith and in the normal course of business*; and
>
> (ii) such failure is *not* the result of the franchisor's insistence upon such changes or additions *for the purpose of preventing the renewal of the franchise relationship.*

15 U.S.C. § 2802(b)(3)(A) (emphasis added).

It is uncontested that each of the provisions of S.B. 235 at issue forbade terminations and nonrenewals that the foregoing provisions of the PMPA permit.[2] VGMARA has also conceded that the provisions of S.B. 235 at issue gave franchisees a state law cause of action to contest franchise terminations (or nonrenewals) that otherwise would be permitted by the PMPA. In fact, the Fourth Circuit previously characterized S.B. 235 as affording dealers a "stiff civil remedy" [3] for terminations for failure to meet quotas, observe hours of operation, and comply with other franchise provisions that are "reasonable and of material significance" within the meaning of the PMPA. Accordingly, Mobil contended below that S.B. 235 was

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[2] *See, e.g., Mobil Oil Corp. v. Karbowski*, 667 F. Supp. 927, 935-36 (D. Conn. 1987), *aff'd*, 879 F.2d 1052 (2d Cir. 1989) (fuel sales quotas); *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 983-84 (2d Cir. 1989) (hours of operation); *Palmieri v. Mobil Oil Corp.*, 529 F. Supp. 506, 511 (D. Conn.), *aff'd*, 682 F.2d 295 (2d Cir. 1982) (failure to pay or to agree upon rent); *Sachi v. Mobil Oil Corp.*, 1980-1 Trade Cas. (CCH) ¶ 63,044 (E.D.N.Y. 1979) (expiration of lease term); *Thompson v. Amoco Oil Co.*, 903 F.2d 1118 (7th Cir. 1990) (failure to devote personal attention to franchised premises).

[3] *See Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) (*"Mobil I"*).

invalid because it imposed a "law or regulation (including any penalty or remedy applicable to any violation thereof) *with respect to* termination" that is not "the same as" the applicable provision of the PMPA. 15 U.S.C. § 2806(a) (emphasis added). This conflict between S.B. 235 and the express preemption provision of the PMPA—and not the "implied preemption" argument attributed to Mobil by VGMARA, Pet. 8-9—is the rationale advanced by Mobil here, in the Fourth Circuit, and before the district court.

The district court essentially agreed with this analysis of S.B. 235, and held that PMPA § 2806 preempted all but the "rent control" provision of S.B. 235. The district court took the view that the rent control provision merely regulated the "substance" of the franchise relationship, and did not implicate termination or renewal. The district court also held as an independent, alternative ground for its decision that S.B. 235 was a "Special Law," invalid under the Virginia Constitution. Virginia's Special Laws provision aims to prevent "economic favoritism" by requiring that the class regulated by a law be reasonable to the furtherance of its purposes, and that the law not arbitrarily exclude classes that would naturally come within its scope. Applying the Virginia constitutional standard, the district court observed:

> There is no 'natural and reasonable' distinction between a Mobil station that leases to a franchisor, a Crown station operated by Crown itself, a Texaco station operated by a 'jobber,' and a convenience store that leases its premises to a Citgo. Yet under S.B. 235 only the Mobil station is covered.

Pet. App. B37-B38. The district court thus concluded that refiners such as Mobil that leased their stations to franchised dealers had been arbitrarily separated from other competitors in an invalid attempt to further private interests.

The court of appeals affirmed the district court's PMPA preemption decision with the exception of its hold-

ing that the "rent control" provision was valid under the PMPA. The Fourth Circuit noted that Congress "used very broad language to define the PMPA's preemptive scope" by using the terms "with respect to termination." Pet. App. A11. The court of appeals accordingly found that the "plain language of the statute" required it to hold that S.B. 235, including the rent control provision, was preempted. As the court of appeals stated its holding: "Unless the terms prohibited by S.B. 235 would in all circumstances be unreasonable and immaterial—a finding we are unwilling to make—S.B. 235 eliminates grounds for termination that would be available under the PMPA" and provides franchisees with a remedy for termination that is thus not "the same as" those set forth in the PMPA. Pet. App. A10. The court's analysis was consistent with that of every other court of appeals to address the issue. Chief Judge Ervin dissented, arguing that the PMPA leaves the States free to regulate the "substance" of the franchise relationship, that S.B. 235 did not affect the procedural aspects of termination that are preempted by the PMPA, and that the majority's ruling threatens to leave States powerless to regulate petroleum franchises.

On petitions for rehearing and rehearing in banc, no judge of the court of appeals requested a poll of the judges. The petitions were accordingly denied. Following denial of rehearing, the Attorney General of Virginia determined not to seek certiorari. VGMARA is thus the sole petitioner here.

REASONS FOR DENYING THE PETITION

The court of appeals' opinion represents a straightforward application of express statutory preemption language to the operation of a particular state statute. The Fourth Circuit employed the same analysis used by every single court of appeals to address PMPA preemption. Nothing about this decision merits plenary review. The briefs of VGMARA and *Amici* claim that review is warranted on the basis of alleged differences of opinion among lower courts on PMPA issues, but none of these issues is presented in this case. The court of appeals' decision faithfully followed the statutory language and congressional intent embodied in the PMPA, and the decision recognizes the appropriate role of the States in regulation of franchise relationships. Contrary to the incorrect statements of VGMARA and *Amici*, Mobil does not take the position that all state laws potentially applicable to petroleum franchises are preempted, and this was not the holding of the court of appeals. Finally, the decision below was also fully supported by an alternative state law ground of decision not addressed by the court of appeals, providing a further reason that this is an inappropriate case for certiorari review.

I. THE FOURTH CIRCUIT'S APPROACH TO PMPA PREEMPTION IS ACCEPTED BY EVERY CIRCUIT THAT HAS ADDRESSED THE ISSUE

VGMARA asserts in its introduction that this petition involves a recurring conflict among the circuits on the issue of PMPA preemption. Pet. 6. Yet the body of the petition studiously avoids comparing the actual holding of the Fourth Circuit here with the decision of any other court of appeals. Instead, the most VGMARA is willing to say is that Mobil relied upon a Sixth Circuit decision, *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986), and that *Consumers* conflicts with decisions from other courts of appeals and district courts, including *Esso Standard Oil Co. v. Department of Con-*

sumer Affairs, 793 F.2d 431, 434 (1st Cir. 1986) and *O'Shea v. Amoco Oil Co.*, 886 F.2d 584 (3d Cir. 1989). *See* Pet. 20-23. VGMARA's attempt to avoid addressing the opinion below is telling, because the Fourth Circuit's analysis here was the same analysis expressly approved in *Consumers, Esso Standard*, and *O'Shea*. Indeed, *no* other court of appeals has ever applied a standard for PMPA preemption narrower than the one the Fourth Circuit applied in this case.

VGMARA's reliance upon *Esso Standard* serves to highlight the absence of any basis for certiorari. The First Circuit's opinion was a key authority cited by the Fourth Circuit in *support* of its decision. Mobil has argued from the start of this litigation that the PMPA preempts state petroleum franchise laws that impose penalties on, and permit franchisees to challenge, terminations permitted by the PMPA. VGMARA concedes that S.B. 235 does this. They fail to mention that the statute at issue in *Esso Standard* did not. In that case, the First Circuit upheld a statute that provided for a state authority to set rents, but specifically *allowed* the franchisor to terminate the franchise if it were uphappy with the rent actually set. The court's reasoning explicitly and directly supports the Fourth Circuit's opinion here:

> The preemption provision of the PMPA would clearly invalidate any DOCA regulation that set rental rates for a franchise *and then* did not allow a franchisor to terminate or not renew a franchise if it did not wish to accept that established rate. That is, *any law that gave a franchisee a cause of action to contest a termination of a franchise, when that termination would otherwise be valid under the PMPA, would be preempted by the PMPA.*

Id. at 434 (emphasis added). The challenged provisions of S.B. 235 do exactly what the *Esso Standard* court said a state or local regulation cannot do and still survive preemption.

The Third Circuit in *O'Shea*, like the First Circuit in *Esso Standard*, found that a state law claim (for fraud in the inducement of a contract) was not preempted by the PMPA because it did not alter the franchisor's rights to termination under the PMPA. Like *Esso Standard*, the *O'Shea* opinion again explicitly applied the same approach to preemption applied by the panel here. As a means of illustrating why the opinion below poses no conflict with *O'Shea*, Mobil cannot hope to improve upon VGMARA's quotation from *O'Shea* at page 24 of its petition:

> And, with respect to the grounds for termination, we believe that PMPA only preempts state laws that *limit the permissible substantive reasons* that a petroleum franchisor can terminate a franchisee.

886 F.2d at 592 (emphasis added). At the risk of excess repetition: appellants concede, as the Fourth Circuit held in *Mobil I*, that S.B. 235 *does* "limit the permissible substantive reasons that a petroleum franchisor can terminate a franchisee." The *O'Shea* analysis mandates its preemption.[4]

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[4] VGMARA additionally argues that the opinion below conflicts with three district court decisions. While conflicting district court authority would provide no basis for a grant of certiorari, the cases are not in conflict. In *Lasko v. Consumers Petroleum of Connecticut, Inc.*, 547 F. Supp. 211, 217 (D. Conn. 1981), there was no contention that the Connecticut statute at issue prohibited terminations and nonrenewals otherwise permitted by the PMPA. Here, that is exactly the position consistently taken by VGMARA. In *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F. Supp. 1008, 1018 (N.D. Ga. 1979), *aff'd*, 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932 (1981), the district court "agree[d] that [the] existence of the PMPA forbids a suit by a Georgia dealer claiming he was terminated because he refused to agree to terms forbidden by the Georgia Act . . . ." The district court declined to find preemption, however, based upon its (incorrect) prediction back in 1979 that suits by terminated franchisees were merely a "slight, unlikely possibility." *Id.* The intervening fifteen years of PMPA franchise litigation makes clear that it was based on a false premise and no longer has even any persuasive force. Finally, *Civitella v. Shell Oil Co.*, 656 F. Supp. 144 (D. Ariz. 1986), which allowed general

VGMARA also cites *Pride v. Exxon Corp.*, 911 F.2d 251 (9th Cir. 1990) as conflicting authority. Pet. 25. Again, however, *Pride* rejected a preemption claim on grounds that the state law claim at issue *did not* affect the rights of a franchisor to terminate under the PMPA. Like *Esso Standard* and *O'Shea*, the *Pride* opinion specifically acknowledged that provisions like S.B. 235 fall in a different category. 911 F.2d at 258 ("Pride's fraud claim is not founded upon state law that would have the effect of limiting the permissible statutory reasons that a petroleum franchisor can terminate a franchisee."). *Pride* allowed a state law claim for misrepresentation in the formation of a contract, holding that nothing in the PMPA prevents a franchisor from simply being held to its promises under the *general* state common law of contracts. *Id.* at 257-58. *Pride* is entirely consistent with the court of appeals' opinion here, which deals not with generally applicable statutory or common law, but with a statute that specifically gives petroleum franchisees a cause of action to contest terminations and nonrenewals permitted by the PMPA.[5]

The Fourth Circuit's approach to preemption here is in accord not only with that of the First Circuit in *Esso Standard* and the Third Circuit in *O'Shea*, but also with that of the Second, Sixth, Eighth, and Ninth Circuits. Perhaps most instructive are the Second Circuit's opinions in *Darling v. Mobil Oil Corp.*, 864 F.2d 981 (2d Cir. 1989) and *Mobil Oil Corp. v. Karbowski*, 879 F.2d 1052

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state common law claims of fraud and misrepresentation, poses no conflict here for the same reasons applicable to the *Pride* decision discussed above.

[5] For the same reasons discussed above with respect to *O'Shea* and *Pride*, VGMARA's citation (disfavored under 10th Cir. R. 36.3) to the unpublished opinion in *Filiaga v. Chevron, U.S.A., Inc.*, No. 89-4098 (10th Cir. 1990), provides no basis for review. *Filiaga* addressed a general common law claim of equitable estoppel in the context of a motor fuel franchise, and did not involve a state statute with respect to grounds for termination such as S.B. 235.

(2d Cir. 1989), *aff'ing*, 667 F. Supp. 927 (D. Conn. 1987). In those cases, the Second Circuit held that the PMPA preempted Connecticut provisions preventing termination or nonrenewal for failure to meet sales quotas or operate 24 hours. As with the statutes in the Second Circuit cases, S.B. 235 is preempted because "[t]he state law effectively prejudges what is an unreasonable and immaterial provision in a franchise agreement so as to preclude a termination or nonrenewal based on the franchisee's failure to comply with such a provision." 667 F. Supp. at 935.[6] The best treatment VGMARA can muster for *Darling* is to say that it is "at odds" with VGMARA's preferred construction of the PMPA. Pet. 22.

The Ninth Circuit has recently used the same analysis as the Fourth Circuit in finding that a state law challenge to the rental structure of a petroleum franchise agreement is preempted by the PMPA. *See Simmons v. Mobil Oil Corp.*, 29 F.3d 505 (9th Cir. 1994). The Ninth Circuit held that the franchisee's proper remedy for complaints about rent levels is to refuse to sign the agreement and bring an action under the standards of the PMPA: "State law imposes a different standard of behavior, and therefore state law claims are preempted by 15 U.S.C. § 2806." *Id.* at 512. As in *O'Shea*, the court found that only state common law claims that did not "implicate Mobil's termination or nonrenewal of the franchise" survived PMPA preemption. The Ninth Circuit stressed the PMPA's strong preemptive force:

> We have held that section 2806(a) "provides for preemption of *all* state law inconsistent with the PMPA. The language in section 2806(a) makes

[6] In *Darling*, the Second Circuit carefully discussed and *rejected* the approach to the PMPA advanced by appellants here. Instead, the Second Circuit held that state law proscription of a ground for termination that *could be* considered "reasonable and material" under the PMPA creates "a direct conflict between federal and state law." 864 F.2d at 987.

> clear the PMPA *was intended to preempt all state law* with respect to termination of a petroleum franchise." *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986); *accord, Humboldt Oil Co. v. Exxon Co., U.S.A.*, 823 F.2d 373, 374-75 (9th Cir. 1987) (per curiam) (California law on assignment is preempted by the PMPA, whose purpose is to provide a "national, uniform policy for petroleum franchise termination"), *cert. denied*, 485 U.S. 1021 (1988).

Id. at 511 (emphasis in original).

Finally, the Sixth and Eighth Circuits have taken a view of PMPA preemption that is at least as expansive as the court of appeals' opinion on the facts presented here. In *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986), the case about which VGMARA complains most bitterly, *see* Pet. 10-13, the Sixth Circuit held that the PMPA preempts even common law claims of fraud and misrepresentation. What VGMARA fails to mention is that no such common law claims are involved here. VGMARA's complaints about the *Consumers* preemption analysis thus have no relevance to this petition. Similarly, the Eighth Circuit in *Continental Enterprises, Inc. v. American Oil Co.*, 808 F.2d 24, 28 (8th Cir. 1986), held that the PMPA preempts state law claims for tortious interference with contract, breach of contract, and misrepresentation arising out of a franchise termination. Of course, these decisions regarding preemption of state common law claims *support* the Fourth Circuit's narrower analysis here, which invalidated state statutory provisions explicitly aimed at restricting permissible grounds of termination in petroleum franchises. To the extent their holdings involve broader questions of PMPA preemption, those questions are not presented here.

The list of alleged "conflicts" set forth by *Amici*, *see* Amici Br. 11-12, further demonstrates that, to the extent there is any conflict of authority under the PMPA, it is not one presented here. In addition to arguments already

addressed above, *Amici* say that there is a conflict involving PMPA coverage of "ancillary franchises." *Id.* at 12. But there is no ancillary franchise involved in this case. Even more egregious, *Amici* contend the Court should grant review because of a circuit conflict over state "goodwill statutes." Amici Br. 11-12. In addition to the fact that goodwill statutes are not involved in this case, *Amici* fail to inform the court that the recent PMPA amendments specifically invalidate goodwill provisions, removing any conflict that might have existed in the past. *See* P.L. 103-371, at § 5, 108 Stat. 3484, 3485 (1994). In short, the circuits have taken a remarkably consistent approach to PMPA preemption, and the invalidation of the challenged provisions of S.B. 235 below is squarely within the uniform core of the analysis in every circuit. There is no conflict here.

II. THE FOURTH CIRCUIT'S OPINION CORRECTLY REFLECTS CONGRESSIONAL INTENT AND PROVIDES APPROPRIATE SCOPE FOR VALID STATE REGULATION

Because the circuits so uniformly accept the principle that state law cannot prohibit grounds of termination in petroleum franchises that are allowed by the PMPA, appellants have mischaracterized the court of appeals' opinion and Mobil's position. They thus assert that the panel opinion precludes *all* state law involvement in anything connected with petroleum franchises and mandates total preemption of all state law affecting them. Pet. 7, 28. This is then said to conflict with the PMPA's "primary purpose" of protecting franchisees, which VGMARA contends must override every other consideration in PMPA cases. Neither the court of appeals' opinion nor Congress' expressed intent in passing the PMPA supports these contentions.

VGMARA appears to believe that this entire case (and every PMPA case) can be resolved with the simple statement that "the primary objective and purpose of the

PMPA was protection of franchisees." *E.g.*, Pet. 10. Putting aside VGMARA's pages of rhetoric, this argument boils down to an assertion that in PMPA cases the franchisee must always win. This is nothing more than law office history. In addition to the plain language of the statute's text, on which the Fourth Circuit based its opinion, the legislative history indicates that *uniformity* of federal law and protection of *flexibility* for franchisors are important goals of the PMPA:

> just as remedying the disparity in bargaining power between franchisors and franchisees provides a need for this legislation, federal legislation is also needed in order to establish uniform guidelines regarding the franchise relationship.

S. Rep. No. 731, 95th Cong., 2d Sess. 19-20, *reprinted in* 1978 U.S.C.C.A.N. 873, 877. In short, as the court of appeals recognized, every piece of legislation reflects a balance between *competing* objectives, and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." Pet. App. A11, *citing Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original).

VGMARA premises its petition on the incorrect assertion that the court of appeals' opinion mandates preemption of *all* state laws to the extent they apply to motor fuel franchises. But, as described above, the Fourth Circuit made no such holding. Questions concerning the outer limits of PMPA preemption are not presented in this case and need not be addressed until they arise. For example, the Third Circuit in *O'Shea* found that the PMPA did not preempt the generally applicable state law of fraud in the inducement of a contract. The Sixth Circuit in *Consumers Petroleum* and the Eighth Circuit in *Continental Enterprises* have taken a broader view of PMPA preemption and have found common law claims of fraud and misrepresentation preempted. *See supra* at 13. No such questions are before the Court here. In

contrast, the panel addressed a paradigm case for preemption—a statute exclusively applicable to petroleum franchises that specifically prohibits terminations and nonrenewals on grounds permitted by the PMPA. *See* n.2, *supra*.

Amici cite this Court's opinion in *CTS Corporation v. Dynamic Corporation of America*, 481 U.S. 69 (1987) for the proposition that preemption should not be found in areas of longstanding regulation unless Congress has said so explicitly. Amici Br. 3-5. But *Amici* ignore the fact that the statute at issue in *CTS* (the Williams Act), unlike the PMPA, *did not* even contain an express preemption provision. This is a statutory express preemption case, and VGMARA's and *Amici*'s arguments about implied preemption are totally off point. Moreover, this Court in *CTS* found that the state statute at issue *furthered* the aims of the federal statute. *See* 481 U.S. at 81-83. That is hardly the case here, where *Amici*'s position would result in a return to the "uneven patchwork" of state franchise regulation that the PMPA sought to correct, undermining the PMPA's goal of uniformity.

There is simply no basis for VGMARA's contention that franchisees lack protection in view of the franchisee safeguards in the PMPA, including its proscription of "unreasonable" actions by refiners. *See, e.g.*, 15 U.S.C. § 2802(b)(2)(A). The Fourth Circuit's opinion, moreover, leaves ample room for state laws that do not affect the grounds for termination that are otherwise available under the PMPA. An example of this is the statute at issue in *Esso Standard*, which expressly allowed the franchisor to terminate the franchise rather than submit to state-mandated rental levels. The Third Circuit's view of preemption with respect to state law misrepresentation claims in *O'Shea* likewise is an example of state law that the PMPA leaves in place. Other examples can be found in the Virginia Petroleum Products Franchise Act itself, such as Va. Code § 59.1-21.15, requiring certain disclosures by the refiner before the execution of a franchise

agreement. Disclosure provisions have no relation to termination, and they are not preempted. In short, to the extent they are not "with respect to termination," state franchise regulations are undisturbed by the PMPA.

Presenting an argument never made in the courts below, *Amici* contend that the introductory phrase "to the extent any provision of this subchapter applies to the termination . . . of any franchise" indicates that PMPA preemption is narrow.[7] *Amici* argue that because the provisions of S.B. 235 do not contradict any specific provision of the PMPA that "applies to termination," they are not preempted. But *Amici* are able to make this argument only by omitting from their description of the grounds for preemption set forth in the PMPA, *see* Amici Br. 7-8, any mention of the PMPA's authorization for franchisors to terminate for reasons of

- "failure by the franchisee to comply with any provision of the franchise, which provision is both *reasonable* and of *material significance* to the franchise relationship," 15 U.S.C. § 2802(b)(2)(A) (emphasis added);
- "failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise," 15 U.S.C. § 2802(b)(2)(B); or
- "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable." 15 U.S.C. § 2802(b)(2)(C).

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[7] *Amici*'s half-hearted Tenth Amendment argument, Amici Br. 9, also was not advanced below, and is not properly before the Court. In any event, *Amici* cite no case supporting the proposition that PMPA preemption as applied here implicates the Tenth Amendment, and there is no such case. While Mobil respects the principles of federalism embodied in the Tenth Amendment, they are not implicated here. The inclusion of this desperate argument provides the Court a strong signal with respect to all of *Amici*'s arguments, not unlike the thirteenth chime of a clock.

Each of the contested provisions of S.B. 235 forbids terminations on grounds upon which franchisors are entitled to terminate under these provisions of the PMPA. *See supra* at 5 & n.2.

The problem with *Amici*'s position is illustrated by its application to one of the grounds for termination at issue here—failure to meet fuel sales quota. Under the PMPA, courts determine on a case by case basis whether particular sales quotas are "reasonable and material" on a given set of facts. *See, e.g.*, S. Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S.C.C.A.N. 873, 901 (PMPA requires resolution of disputes on a "case-by-case basis"). *Amici* would instead allow States to eliminate this federal statutory scheme by allowing state law to determine on a statewide basis—without the case by case review mandated by federal law in the PMPA—that *all* fuel quotas are unreasonable no matter what the facts. The contention is that, despite explicit language to the contrary in § 2806, any state law relating to the "substance" of the franchise relationship should override the termination provisions of the PMPA, even though such state laws eliminate grounds for termination and nonrenewal currently available under the PMPA. In essence, *Amici* argue that the state law remedial scheme should preempt federal law. This is exactly backwards.

The Court has unanimously rejected the type of statutory analysis advocated by *Amici* here. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990) (States may not "withdraw federal remedies by establishing state remedies as exclusive" and state attempts to do so "cannot be viewed as permissible interstitial regulation in the service of, or at least neutral with respect to, the purposes of the federal scheme"). The PMPA grants some rights to franchisees (to further the purpose of franchisee protection) and some rights to franchisors (to further the purposes of national uniformity in the law and franchisor flexibility). The PMPA grants franchisors a right to

terminate franchises under certain conditions. States may no more deprive franchisors of these rights to terminate than they may deprive franchisees of their protections under the federal law.

VGMARA has argued at great length below that unless its interpretation of 15 U.S.C. § 2806(a) is accepted, refiners will be free to demand that franchisees employ topless service station attendants, serve beer after midnight, and sell cigarettes to minors. It is *not* Mobil's position that general laws of this type are preempted. Moreover, this brand of anti-preemption hyperbole has already been rejected by this Court. In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), a preemption case strikingly similar to this one, the Court found state advertising and consumer protection statutes preempted by the Airline Deregulation Act's express preemption of any state law "relating to" rates, routes, or services of an air carrier. Like the Fourth Circuit here, the Court looked to the express language of the statute, and was unpersuaded by the Texas Attorney General's contention that preemption would allow airlines to engage in gambling and prostitution. *See* 112 S. Ct. at 2040 (aptly noting that such extreme examples could be addressed in the unlikely event they arose, and that "the present litigation plainly does not present a borderline question").

VGMARA would like to pretend that there is no difference between laws of general application and statutes like S.B. 235 that specifically target petroleum franchise terminations. This Court, however, has indicated in the contexts of airline deregulation and cigarette labeling legislation how this distinction can apply. *See American Airlines, Inc. v. Wolens*, No. 93-1286 (U.S. January 18, 1995) (holding application of state statutory "consumer fraud" regulation to airlines preempted under express preemption provision of Airline Deregulation Act but allowing claims under State's general common law of contract); *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2624 (1992) (finding state law claims predicated on a "duty

'based on smoking and health' " preempted while claims based "on a more general obligation—the duty not to deceive" survive preemption). Likewise in *O'Shea*, the court of appeals noted in upholding a state common law contract claim that the "goal of the framers of the PMPA was to create a uniform system of franchise termination, not a uniform system of contract law." 886 F.2d at 593. But such broad questions are not presented here. The court of appeals, like every other circuit, has correctly concluded that state provisions directly aimed at petroleum franchises that prohibit grounds for termination permissible under the PMPA are preempted by federal law.

III. THE UNADDRESSED VIRGINIA LAW GROUND FOR DECISION BELOW COUNSELS AGAINST REVIEW

The distinction between laws of general applicability and narrow special interest legislation provides an additional reason why the Court should not devote its resources to review of this case. In addition to PMPA preemption, the district court found that S.B. 235 was invalid because it is a "special law" in violation of the Virginia Constitution. Pet. App. B32-B39. This Virginia doctrine prohibits enactment of special interest economic favoritism such as S.B. 235 that arbitrarily treats one class of persons differently from another. Applying Virginia's special laws doctrine, the district court noted that S.B. 235 admittedly "targets less than 20 percent of Virginia's 5,278 retail outlets for the sale of motor fuel," just as the Sunday closing statute in *Benderson Development Co. v. Sciortino*, 236 Va. 136, 372 S.E.2d 751 (1988), covered less than 20 percent of the employed persons in Virginia. Pet. App. B38. The district court noted that the beneficiaries of S.B. 235 are "a discrete group of franchisees represented by VGMARA," most of whom "average incomes of more than $100,000 annually," *id.*, and concluded that S.B. 235 is a classic example of the type

of special interest legislation prohibited by the special laws doctrine.

Regardless of the disposition of Mobil's PMPA claim, neither VGMARA nor anyone else has advanced an explanation of why the Virginia district judge's thorough analysis of Virginia law on this point is in any way lacking. Thus, review of the federal PMPA issue would have no effect on the ultimate outcome of the case. In this circumstance, plenary review would hardly be a wise discretionary use of this Court's time and resources, even if certiorari were otherwise appropriate under the Court's established standards. *See generally* R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* 173 (7th Ed. 1993).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 94-1000

IN THE

Supreme Court Of The United States

October Term, 1994

VIRGINIA GASOLINE MARKETERS AND AUTOMOTIVE REPAIR ASSOCIATION, INC.,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE WMDP SERVICE STATION AND AUTOMOTIVE REPAIR ASSOCIATION; MINNESOTA SERVICE STATION AND CONVENIENCE STORE ASSOCIATION; WISCONSIN AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATES; IOWA RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION; AND, GEORGIA ASSOCIATION OF PETROLEUM RETAILERS IN SUPPORT OF THE PETITIONER

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This Amicus Curiae brief is filed on behalf of state and regional service station and automotive repair associations representing over 3,500 retail service station dealers from states in the Third, Fourth, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits.[1] An important function of these trade associations is to represent the interests of their members on critical issues before courts, legislatures and regulatory agencies.

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit has serious adverse implications for retail service station dealers nationwide in that it strikes down on federal supremacy and preemption grounds an entire state statute regulating substantive terms of petroleum franchise agreements. The decision below converts the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801-2806, enacted by Congress as a shield to protect retail dealers from arbitrary and discriminatory franchise terminations, into a destructive weapon, capable of destroying extensive state statutory and common law protections.

As expressed by Chief Judge Ervin in dissent, the majority opinion has very troublesome implications. Under the majority's broad preemption approach, state regulation of any aspect of the contractual relationship between dealers and distributors would be obliterated by a federal statute having nothing to do with this aspect of the relationship, leaving a huge void that would, contrary to this Court's teachings, necessarily have to be filled through the development of federal common law related to petroleum franchises.

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[1] The District of Columbia, as well as the states of Maryland, Delaware, Pennsylvania, Minnesota, Iowa, North Dakota, Michigan, Wisconsin and Georgia are represented by the Associations participating in this Amicus Curiae brief.

The preemptive scope of PMPA is one with which the lower courts are constantly presented; one over which the lower courts are continually disagreeing; and, particularly in light of the broad brush approach taken by the Fourth Circuit, one that requires a definitive ruling by this Court. PMPA was enacted by Congress in 1978 and there have been hundreds of cases decided under it; yet, this Court has yet to interpret this very significant federal statute. The present case is a compelling one for review. The Fourth Circuit has turned the PMPA on its head and has misapplied this Court's preemption teachings in the process.

The significance of the preemption issue to the nation's petroleum marketing industry and the preservation of state statutory and common law protections is enormous. Amicus Curiae urge the Court to grant the Petition for Writ of Certiorari.

II. SUMMARY OF ARGUMENT

The decision by the Fourth Circuit Court of Appeals has eviscerated Virginia law regulating gasoline franchises and has, in the process, created the very real potential for eliminating all other state statutes and common law applicable to gasoline retailers.

Despite the limiting reach of the express preemption language of §2806(a) of the PMPA, and the limited preemption interpretation given by some other courts of appeals, the Fourth Circuit has made the deepest possible cut to the heart of state regulation. This broad application of PMPA preemption is contrary not only to the primary purpose of the PMPA, which is franchisee protection, but is also contrary to the preemption principles adopted by a majority of this Court in *Cipollone v. Liggett Group, Inc.*, ____ U.S. ____, 112 S.Ct. 2608, 102 L.Ed.2d 407 (1992). Those preemption principles mandate that:

1. "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."

2. Express preemption provisions are "construe[d] . . . in light of the presumption against the preemption of state police power regulations."

3. There is no "general, inherent conflict between federal preemption" requirements and "the continued vitality of state common law damages actions."

4. The courts "must fairly but - in light of the strong presumption against preemption - narrowly construe the precise language of" an express preemption provision.

5. "[E]ach phrase within [an express preemption] clause limits the universe of common law claims preempted by the statute." *Id.* 112 S.Ct. 2618, 2621.

The Fourth Circuit violated each of these principles with its broad and sweeping preemption decision.

In *CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69, 86 (1987) this Court held that "[t]he longstanding prevalence of state regulation . . . suggests that, if Congress had intended to preempt all state laws . . . it would have said so explicitly." Franchise regulation has traditionally been a longstanding area of state regulation under franchise statutes[2] and

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[2] State regulation of service station franchises is pervasive. *See, e.g.*, Code of Alabama 1975, Title 8, Ch. 22, §8-22-1 to §8-22-18; Alaska Statutes, Title 45, §45.50.800 to §45.50.850; Arizona Rev. Statutes, Title 44, Ch. 10, Article 8, §44-1551 to §44-1562; Arkansas Code of 1987 Anno., Title 4, Ch. 72, Subch. 4 and 5, §4-72-201 to §4-72-603; California Statutes of 1975, Ch. 640, Bus. & Professions Code, Division 8, Ch. 7.5, §20999 to §20999.4; Connecticut General Statutes, Title 42, Ch. 739, §42-126 to §42-133gg; Delaware Code Anno., Title 6, Ch. 29, §2901 to §2912; District of Columbia Code Anno., Title 10, Ch. 2, Subch. III, §10-221 to §10-227; D.C. Code, Title 45, Ch. 19, §45-1921 to §45-1951; Florida Statutes 1991, Title 33, Ch. 526,

under general legal principles that states can regulate transactions between merchants dealing with such matters as leases and supply arrangements. Contrary to the overriding purpose of the PMPA, which is *franchisee* protection, the Fourth Circuit's decision lays open the opportunity for courts to determine that there is no state common law or other state regulation that can be applied to govern the substantive terms of the contracts and agreements between petroleum franchisors and franchisees. Under the Fourth Circuit's analysis, each issue between the franchisor and the franchisee becomes a federal question because it can potentially become part of the end game of termination or non-renewal and hence be preempted.

Since its passage in 1978 at the height of the energy crisis, this Court has not reviewed any decision by a lower court interpreting the PMPA, despite a wide divergence of opinions

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§526.01 to §526-56; Official Code of Georgia Ann., Title 10, Ch. 1, Article 9, §10-1-230 to §10-1-241; Hawaii Rev. Statutes, Title 26, Ch. 486H, §486H-1 to §486H-9; Indiana Code, Title 23, Ch. 2.7, §23-2-2.7-1 to §23-2-2.7-7; Iowa Code, Title 13, Ch. 323, §323.1 to §323.14; Louisiana Rev. Statutes of 1950, Title 51, Ch. 14, §1451 to §1455; Maine Rev. Statutes Ann., Title 10, Ch. 215, §1451 to §1458; Ann. Code of Maryland, Comm. Law Article, Title 11, Subtitle 3, §11-301 to §11-308; Gen. Laws of Massachusetts, Title 15, Ch. 93E, §1 to §9; Minnesota Statutes 1992, Ch. 80C, §80C.01 to §80C.22; Mississippi Code 1972 Ann., Title 75, Ch. 24, §75-24-51 to §75-24-61; Revised Statutes of Missouri, 1986, Title 26, Ch. 407, §407.400 to §407-420; Nevada Rev. Statutes, Title 52, Ch. 597, §597.270 to §597.470; New Hampshire Rev. Statutes Ann., Title 31, Ch. 339-C, §339-C:1 to §339-C:23; New Jersey Rev. Statutes 1937, Title 56, Ch. 10, §56:10-1 to §56:10-29; New Mexico Statutes 1978, Ch. 70, Art. 8, §70-8-1 to §70-8-6; New York Gen. Business Law, Ch. 20, Article 11-B, §199a - §1991; Pennsylvania Statutes Title 73, Ch. 4, §202-1 to §202-8; Laws of Rhode Island, Title 5, Ch. 55, §5-55-1 to §5-55-9; Tennessee Ann. Code, Title 47, Ch. 25, Part 6, §47-25-601 to §47-25-626; Utah Code Ann. 1953, Title 13, Ch. 12, §13-12-1 to §13-12-8; Vermont Statutes Ann., Title 9, Ch. 109, §4101 - §4110a; Code of Virginia, Title 59.1, Ch. 2.2, §59.1-21.8 to §59.1-21.18:1; Rev. Code of Washington, Title 19, Ch. 19.100, §19.100.010 to §19.100.940; Code of West Virginia 1931, Ch. 47, §47-11C, *et seq.*; Wisconsin Statutes, Ch. 135, §135.01 to §135.07.

impacting the nation's second largest industry. This divergence of opinion is particularly widespread on the issue of preemption.

From the oil embargo to 1978, the number of gasoline dealers declined by 35,000[3] Since the passage of the PMPA, the decline has nevertheless continued. The absence of state law protection in the form of state regulation of the substantive provisions of franchise agreements will accelerate that decline because there will be no state statute or common law protections available if the Fourth Circuit's analysis is allowed to prevail.

The history of the PMPA, its express limiting language on preemption, the conflict of decisions among the circuits and the Fourth Circuit's failure to follow this Court's decisions requiring narrow application of express preemption provisions in federal legislation all mandate that the divided opinion of the Fourth Circuit be reviewed and reversed by this Court.

III. ARGUMENT

A. IF CONGRESS HAD INTENDED BROAD PREEMPTION OF SUBSTANTIVE STATE LAWS, IT WOULD HAVE SAID SO PLAINLY.

As this Court expressed in *CTS Corporation v. Dynamic Corporation of America*, *supra*, 481 U.S. 86, if Congress intended to preempt state regulation in an area long regulated by the states, it would have said so explicitly. The basic fact that different appellate courts have reached different conclusions on the language utilized by Congress, as well as the split decision by the Fourth Circuit itself, with the Chief Judge in dissent, indicates that Congress has not "explicitly" stated preemption in the broad fashion adopted by the majority of the Fourth Circuit panel. Furthermore, in determining that the preemption language of the PMPA broadly sweeps aside the body of state franchise law specifically crafted by the State of Virginia to

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[3] 124 Cong. Rec. §12762 (May 5, 1978) (Statement of Sen. Durkin), *cited in*, *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605 (8th Cir. 1984).

avoid PMPA conflict, the Fourth Circuit fails to follow this Court's teaching in *Cipollone* that all state law is not "of a piece". Each must be weighed individually against the limiting language of the express preemption provision to determine whether or not there is room for the state regulation and the federal statute to co-exist. The Fourth Circuit has failed to recognize that the PMPA and the state laws can be interpreted and applied harmoniously.

If Congress had intended the broad preemption found applicable by the Fourth Circuit, Congress would have used language other than "to the extent" the PMPA applies "with respect to termination or non-renewal".[4] Instead, Congress would simply have stated that the PMPA preempts "with respect

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[4] The majority of the Fourth Circuit panel appears to have reached their determination of broad preemption by focusing exclusively on the "with respect to" language of Section 2806 while ignoring the very limiting introductory language of that section. *See*, 34 F.3d at 224. Section 2806 begins with the qualifying phrase "[t]o the extent that any provision of this subchapter applies to the termination . . . of any franchise . . . ." The provisions of Subchapter I govern grounds for termination and the notice required to terminate. Period. PMPA has nothing to do with regulating substantive provisions of the franchise, and there are no provisions of Subchapter I which purport to regulate such provisions. As the Second Circuit stated in *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300 (2d Cir. 1986):

> "[t]he PMPA neither expressly nor impliedly preempts all state law relating to any aspect of the termination or non-renewal of petroleum franchises. Rather, it preempts only state statutes as to grounds for, procedures for, and notification requirements with respect to termination or nonrenewal."

Rather than being mere surplusage or a congressional throat-clearing, the introductory phrase of Section 2806 is critical to a proper interpretation of the preemption provision. That the Fourth Circuit ignored this critical language of the Act is apparent from the Court's statement that "[t]he challenged provisions of S.B. 235 are not 'the same as' the PMPA *because they prohibit contractual terms the PMPA does not directly address.*" F.3d at 224 (emphasis added). If the PMPA does *not* address the issue, the state law that *does*

to [petroleum] franchises or franchise relationships." These are terms Congress defined in 15 U.S.C. §2801(1) and (2). This would have made clear that Congress intended to preempt the area of substantive franchise provision regulation.[5]

Instead, it is evident by the structure of the PMPA that Congress intended PMPA to interface with state law. §2801(1)(B)(iii) refers to any "applicable provision of State law which permits such transfer or assignment with out regard to any provision of the franchise." *See also*, §2803(b)(2) and §2806(b). Section 2802(c)(1) allows termination or non-renewal for fraud or criminal misconduct by the franchisee, standards that must be established under state law. Section 2802(c)(5) allows termination upon condemnation or other taking, creatures of state law. Section 2802(c)(6) indicates that

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address it is not preempted. Under the plain language of the statute, PMPA preempts matters with respect to termination or nonrenewal only "to the extent that any provision of [the PMPA] applies . . . ."

[5] In construing the PMPA preemption section, the District of Columbia Court of Appeals has noted "the limited nature of the preemption which this section prescribes." *Davis v. Gulf Oil Corporation*, 485 A.2d 160, 168 (D.C. App. 1984). In *Davis*, the Court contrasted the preemption language used by Congress in the PMPA with that used by Congress in ERISA. Said the Court:

> "This language is to be contrasted with that contained in preemption provisions such as the one included by Congress in the Employee Retirement Income Security Act (ERISA). 29 U.S.C. §1144(a) (1982). In drafting ERISA, Congress originally considered 'a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA.' *Shaw [v. Delta Airlines, Inc.*, 463 U.S. 85 (1983)], 103 S.Ct. at 2900-01. This initial 'limited' ERISA preemption provision was similar to PMPA §2806(a). *See id.* 103 S.Ct. at 2900-01, n.18. The Conference Committee acting on ERISA, however, rejected the proposed preemption clause as too narrow and substituted a provision which preempts 'any and all State laws insofar as they . . . relate to any employee benefit plan,' 29 U.S.C. §1144(a), regardless of whether such local laws address specific subject areas covered by ERISA. *Id.*, 103 S.Ct. at 2900-01 & n.19 & n.20."

termination or non-renewal can occur as a result of the loss of the trademark by the franchisor unless it is due to "violation of federal or state law." Section 2802(c)(8) allows termination for failure to pay timely "all sums to which franchisor is legally entitled," a standard that must be established under state law. Section 2802(c)(11) allows a franchisee to be terminated or non-renewed for failure to comply with state or local laws or regulations relevant to the operation of the marketing premises. Section 2802(c)(12) allows termination or non-renewal upon conviction of the franchisee of felonies involving moral turpitude. Each of the above instances indicates that Congress had no intention of eliminating state laws that would apply to the substantive terms of the contract between franchisees or franchisors. Moreover, the legislative history is devoid of any intent by Congress to eliminate the ability of the states to regulate substantive contract provisions.

B. THE DECISION BY THE FOURTH CIRCUIT ERRONEOUSLY RETURNS ALL ASPECTS OF THE FRANCHISE RELATIONSHIP TO THE END GAME OF TERMINATION AND NON-RENEWAL.

The Fourth Circuit holds that state law regulation of substantive contract provisions is preempted. The error of this approach is evident in the purpose and structure of the PMPA. The PMPA was enacted to deal with arbitrary and discriminatory terminations and nonrenewals. The PMPA established a presumption of franchise relationship continuation unless the franchisor could meet the test for termination or non-renewal under §2802.

To interpret the preemptive effect of §2806(a) to include the substantive provisions of the franchise laws, which states have historically been free to regulate, allows and invites the franchisors to make every matter between themselves and their franchisee a potential ground for termination and non-renewal.

As a result, instead of the PMPA acting as a check on termination and non-renewal, and a supplement to state statute and common law, it would instead supplant state statute and common law by forcing every franchisee into the crucible of termination/non-renewal when any of his contractual or other rights were threatened. In order to obtain any protection, the franchisee would have to risk termination or non-renewal in order to bring the action within the PMPA. Yet, this is precisely the caldron from which the PMPA was to extricate the gasoline dealer. The Fourth Circuit would deny a franchisee any right to a state remedy for franchisor violations during the term of the contract.

The principles of federalism, respect for the powers reserved by the states under the 10th Amendment,[6] and a respect for the role of state legislatures in governing commercial transactions, particularly against a background where states historically have regulated franchises, dictate that the PMPA's express preemption have a narrow application. Such a narrow preemp-

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[6] Under the 10th amendment to the United States Constitution the powers not delegated to the United States by the Constitution are reserved to the States or to the people. The majority opinion by the Fourth Circuit on the scope of preemption violates this 10th Amendment prohibition. In the area of contract formation, the franchisor is limited by the standards of "good faith, normal course of business, and not for the purpose of non-renewal" under §2802(b)(3)(A). In other words, the franchisor can non-renew a franchisee if the franchisee fails to agree to terms in the franchise agreement insisted upon by the franchisor subject only to the standards of §2802(b)(3)(A). If state law is preempted by the standard of good faith, then the scope of preemption is determined by those provisions that a franchisor chooses to put in a franchise contract. Indeed, this is the precise holding with regard to state regulation of rental levels by the Fourth Circuit. 34 F.2d at 226.

The 10th Amendment does not give Congress the power to grant to private business entities, such as the major oil companies, the power to override state regulations through the clever drafting of their counsel. In order to avoid the 10th Amendment conflict and to harmonize the PMPA with historic state regulation of the substantive provisions of contracts and franchisees, review and reversal of the Fourth Circuit's decision is necessary.

tion standard would leave states free to regulate the substantive provisions, and still give the PMPA its intended role in regulating the grounds for and method to be utilized for terminations and non-renewals. For example, a franchisee could still be terminated for failing to adhere to hours of operation provisions under §2802 of the PMPA. A state law could determine what maximum hours of operation could be imposed in the contract between the parties. If the franchisee violated those hours of operation, however, termination could occur. This would give appropriate and due deference to the state's bona fide interests not only in commercial regulation, but also in public safety and the welfare of its citizens under its police powers.[7]

C. REVIEW BY THIS COURT IS ESSENTIAL TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS ON THE SCOPE OF PMPA PREEMPTION.

This Court's guidance on the PMPA preemption question is necessary because of the inconsistent and unpredictable treatment given the issue by the lower courts. Congress' objective of national uniformity on the issue of petroleum franchise termination and nonrenewal is being frustrated rather than furthered because of the hodge-podge treatment of this issue by the courts.The nature and scope of the PMPA preemption problem is easily illustrated and summarized by comparing an excerpt from the Fourth Circuit's opinion in this case to an excerpt from opinions of the Second Circuit and the District of Columbia Court of Appeals.

According to the Fourth Circuit, "Congress used very broad language to define the PMPA's preemptive scope. The statute preempts any state law 'with respect to' termination or nonrenewal which differs from the PMPA."[8] *Mobil Oil Corp.*

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[7] Convenience store/service station attendants are frequent victims of criminal acts.

[8] Continuing, the Court states that

v. Virginia Gasoline Marketers and Automotive Repair Association, Inc., 34 F.3d 220, 225 (4th Cir. 1993). The Second Circuit, in contrast, finds that "[t]he PMPA achieves its uniformity goal through an express and carefully circumscribed preemption provision . . . ." *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 984 (2d Cir. 1989). To like effect, the District of Columbia Court of Appeals, examining the PMPA preemption provision, notes "the limited nature of the preemption which this section prescribes." *Davis v. Gulf Oil Corporation*, 485 A.2d 160, 168 (D.C. App. 1984). *See also*, *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F.Supp. 1008, 1017 (N.D. Ga. 1979), *aff'd sub nom.*, *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981) ("[b]y specifying with such precision when the states must stand aside in favor of federal regulation, Congress implicitly marked out the bounds of the power it intended to exercise. Beyond those limits, state regulation may claim full federal approbation").

Examples of this inconsistent treatment among the circuit courts of appeals illustrate the point.[9] In the Second Circuit, state goodwill statutes are not preempted, *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, while in the Fourth Circuit they are. *Jiminez v. BP Oil Inc.*, 853 F.2d 268 (4th Cir. 1988), *cert. denied*,

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> "[t]he broad scope of the PMPA's preemption clause indicates that Congress chose to protect franchisees by the means provided in the federal statute and to preclude supplementary state regulation of termination and nonrenewal as a means of franchisee protection. Most petroleum franchisors do business in a number of states and Congress has provided a law to govern petroleum franchises in all 50 states to ensure uniformity."

Id., at 225.

[9] Among the district courts, it is not unusual to find conflicting opinions even from the same court. *Compare*, for example, *Vasco v. Mobil Oil Corp.*, 698 F.Supp. 102 (D. Md. 1988) (Maryland hours of operation statute preempted) with *Eden v. Texaco Refining and Marketing, Inc.*, 644 F.Supp. 1573 (D.Md. 1986) (Maryland hours of operation statute not preempted).

490 U.S. 1011 (1989).[10] In the Sixth and Eighth Circuits, common law fraud claims are preempted, *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986); and *Continental Enterprises, Inc. v. American Oil Co.*, 808 F.2d 24 (8th Cir. 1986), while in the Ninth Circuit, they are not. *Pride v. Exxon Corp.*, 941 F.2d 251 (9th Cir. 1990). In the Sixth Circuit, a state franchise act claim related to the termination of an "ancillary franchise" is not preempted, *Geib v. Amoco Oil Co.*, 29 F.3d 1050 (6th Cir. 1994), while in the Ninth Circuit, it is. *Millett v. Union Oil Co. of Calif.*, 24 F.3d 10 (9th Cir. 1994). In the First Circuit, a state may regulate service station rents on the theory that such regulation is directed at a substantive element of a franchise agreement. *Esso Standard Oil Co. v. Department of Consumer Affairs*, 793 F.2d 431. The Third Circuit questions whether the PMPA can be interpreted as incorporating state substantive regulations, *O'Shea v. Amoco Oil Co.*, 586 F.2d 590 (3d Cir. 1989), while the Fourth Circuit specifically preempts any such legislation. *Mobil Oil Corp. v. Virginia Gasoline Marketers and Automotive Repair Assoc.*, 34 F.3d 220. *See also*, *Simmons v. Mobil Oil Corp.*, 29 F.3d 505 (9th Cir. 1994) (state law challenges to rent are preempted).

IV. CONCLUSION.

The issue of PMPA preemption is causing significant confusion and uncertainty in the lower courts. A definitive ruling on the issue by this Court is needed for the benefit of those courts, as well as the state legislatures and prospective litigants.

Chief Judge Ervin, in dissent, expressed concern that under the majority's approach to preemption, "any changes in state law, not just those particular to the petroleum franchise scenario, that affect the substance of these contract relationships must be struck down (at least as to petroleum franchisees) because they

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[10] *See also, Atkins v. Chevron USA, Inc.*, 672 F.Supp. 1373 (W.D. Wash. 1987)(State goodwill statute preempted).

narrow the grounds for termination." 34 F.3d at 230. It is this far-reaching implication about which Amicus Curiae are particularly concerned. There is a vast body of state petroleum franchise laws which, in part, compliment the PMPA by regulating substantive aspects of the contractual relationship. A loss of these state protections through federal preemption would be devastating to the industry and leave a large contractual void. Amicus Curiae respectfully request the Court to grant the Petition for Writ of Certiorari.

Respectfully Submitted,

_____

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Supreme Court, U.S.
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No. 94 - 1000

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VIRGINIA GASOLINE MARKETERS COUNCIL,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF SERVICE STATION DEALERS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether rules of implied preemption, such as a holding that a federal law "occupies the field" has any application where the statute contains an express preemption provision ?

2. Whether the Petroleum Marketing Practices Act, 15 USC 2801 et. seq. gives petroleum franchisors the right to be free of state regulation of the substance of franchise agreements by reason of federal preemption, or whether the view of other Courts such as the First Circuit and the dissent that the statute does not give such protection is the correct view ?

3. Whether the 4th Circuit erred in applying preemption decisions under the Airline Deregulation Act and the Employment Retirement Security Act to the Petroleum Marketing Practices Act provisions, which expressly use a different preemption test ?

4. Whether Virginia law governs the relationship between Virginia based Mobil Oil Corporation and Virginia dealers; or whether the Petroleum Marketing Practices Act demands the creation of a body of federal common law to govern motor fuel franchises ?

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INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

In the seventeen (17 years) since its enactment, and through 1994 amendments, the statute which governs franchise terminations and non-renewals in an industry that affects the daily life of almost every American, the Petroleum Marketing Practices Act, has gone without review by this Court. Lower courts continue to engage in a struggle, a struggle that led one commentator to call her law review article "Judicial Interpretation of the Petroleum Marketing Practices: Conflict and Diversity." 32 Emory L.J.273.

Nowhere has this conflict been

more keenly felt that in the area of federal preemption; where the rules are determined by where you live and work.

This is an industry that registered over $ 120 billion dollars in sales last year; with over 50% of that total being registered through the 50,000 plus independent service station dealers represented by the SSDA. See generally, 1994 National Petroleum News Factbook. It is a highly visible industry that dots the major intersections throughout the country. While the Court has found time to hear cases dealing with the minutia of other statutes; gasoline retailers have had to continue to deal with the conflict that only this Court

can resolve.

The tension is seen in the two opinions under review, which cite the same cases from other jurisdictions for support of their diametrically opposing views. Indeed, the author of the 4th Circuit opinion expressly relied on a previous decision he had authored, Jiminez v. BP Oil Co.; 853 F.2d 268 (4th Cir. 1988); in which he noted that the 4th Circuit panel took a much more expansive view of federal preemption than other Circuits.(" if this Court reads the preemption section of the PMPA as narrowly as those Courts did (the 2nd and 6th Circuits, Jiminez might be correct in arguing that the goodwill provision of the Maryland Act must be spared from

preemption...) 853 F.2d @ 273, 274 n.1.

The 4th Circuit majority view of the scope of the preemption provision irreconcilably conflicts with decisions not only of the 2nd and 6th Circuits, as it candidly acknowledged in Jiminez; it also strongly and irreconcilably conflicts with on point decisions of the First Circuit; and decisions of the 7th and 9th Circuits, which hold that state contract law, not federal common law will apply to motor fuel franchises.

The real world effect is that those of us who counsel the hundreds of thousands of men and women who work in this industry cannot give our clients good advice as to what the

governing law is.

In addition, the Courts use different preemption tests; with some applying implied preemption principals; as the 4th Circuit did here. These principals should have no application in light of the limited, express preemption provision of the statute.

This issue has been touched upon in Freightliner Corp. v. Myrick, scheduled for argument this term. The SSDA and its members have a powerful interest in seeing consistent preemption analysis.

The federal statute simply prohibits all terminations and non-renewals of motor fuel franchises as a general rule. 15 USC 2802 (a).

It then specifies exceptions to the general rule; 15 USC 2802(b); that a franchisor must prove exist as an affirmative defense; 15 USC 2805.

The Act contains an express and carefully circumscribed preemption provision, 15 USC 2806 which states that

To the extent a provision of the Act applies to a termination or non-renewal, a state may not adopt enforce or continue in effect any provision of any law or regulation, with respect to the termination or non-renewal at issue, unless the provision is the same as the applicable provision of the PMPA.

We believe the key provisions are "To the extent"; "with respect to the

termination or non-renewal" and "the same as".

PMPA preempts state law only IF it applies, and then only "to the extent" it applies. The "extent" to which it applies is to set a broad legal standard. State law tells us what meets the PMPA standard.

For example, 15 USC 2802(b)(2)(c) allows termination upon the occurrence of an event making termination reasonable. 15 USC 2802(c)(11) provides that one such event is a failure by the franchisee to comply with state and local laws.

There is a critical distinction between substituting a state law termination standard, such as "good cause" for the PMPA termination

standard, and the application of state law to the PMPA standards.

For example, PMPA allows termination where there is a "failure" by the franchisee to comply with a reasonable and material "provision of the franchise". 15 USC 2802(a)

We agree that a franchisee could not defeat a termination action based upon a claim that though the PMPA termination standard is meet, the termination cannot go forward because state law imposes a "good cause" termination standard that is not meet.

On the other hand, franchise agreements are creatures of state law. If under the state law that governs the underlying agreement law; something does not qualify as a

"provision of the franchise", in the first place, then the PMPA standard is not met.

This decision holds that state law is to be totally ignored, in spite of the express provisions in the 1978 Act and the 1994 Amendments incorporating state law into the PMPA.

This is why the issue of the appropriateness of application of implied preemption where the statute has an express preemption provision is of such concern and interest to the SSDA.

Under "field preemption" principals, applied by the 4th Circuit in this case, all state law is ousted, whether or not it is consistent with or identical to the federal

regulation. See, e.g. Campbell v. Hussey 368 U.S. 297 (1961).

The express provisions of this statute allow for consistent and identical state regulation. For the second time, a 4th Circuit panel has applied the idea that PMPA "occupies the field" of termination and non-renewal; and rejected the holding of a sister Circuit in a case on all fours.

Next, the PMPA preempts only state laws "with respect to termination". The term "with respect to" connotes specificity and was used by Congress in order to limit the reach of the PMPA preemption provision. The 4th Circuit read this term broadly based upon the much more general term "related to" found in

ERISA and the Airline Deregulation Act.

Unlike ERISA, the preemptive scope of PMPA is limited to the specific subject matter covered by the Act. In particular, we would direct the Courts' attention to the analysis in Shaw v. Delta Airlines 463 U.S. 85, at 96, 97, and especially page 98 (103 S.Ct. 2900) where the Court rejected the idea that ERISA preemption was limited to the specific subject matters covered by the statute.

In Shaw, the Court held the term "related to" was used in ERISA in its broad sense, and thus, the ERISA preemption provision could not be limited only to state laws specifically designed to affect

employee benefit plans. Id.

Moreover, the Court further noted that given the legislative history, the ERISA provision could not be limited to the subject matter relating to the specific subject matter covered by ERISA. The original ERISA bill contained a preemption clause that was limited to the specific subject matters covered by ERISA; just as the PMPA provision is limited. The limited ERISA preemption provision did not survive the conference committee. Id. @ n.17,18,19.

That is why ERISA, and the Airline Deregulation Act as interpreted in Morales v. Trans World Airlines, 112 S.Ct. 2031, (a decision that relies heavily on Shaw, 112 S.Ct.

at 2036, 2037, and in turn was heavily relied upon by the 4th Circuit) preempt broadly, unlike PMPA.

This opinion rewrites the carefully circumscribed PMPA preemption provision to read like that of ERISA or the ADA.

The PMPA, as repealed, and reenacted by this opinion now reads:

"This Act shall preempt any and all State laws insofar as they may now, or hereinafter relate to termination or non-renewal."

The lengthy, convoluted PMPA language does not say that or mean that.

Finally, SSDA vigorously contends that state laws that regulate the content of petroleum industry

franchise agreements are not only the same as the PMPA - they are one and the same therefore they are not preempted.

The PMPA fails to address the issue of the content of franchise agreements. Last term, in O'Melveny and Myers v. FDIC, 512 US___, 129 L.Ed 2d 67 (1994); the Court held that matters left unaddressed in a federal statute are presumably left subject to state law. 129 L.Ed 2d @ 74.

The panel majority, by wiping out the Virginia law, would force the creation of federal common law rules, thus conflicting with the law of other Circuits such as the 7th, which correctly apply state law. See, e.g., Lippo v. Mobil Oil Corp. 776 F.2d 706,

712 (7th Cir. 1985).

Franchise agreements, other contracts and corporations are creatures of state law, not federal common law. Our view that the PMPA term "provisions of the franchise" must be viewed against the backdrop of the state law that gave birth to the underlying contractual agreements is supported by the 1994 Amendments, Public Law 103-371.

The Amendments amend the failure definition, 15 USC 2801(13), to prohibit franchise terminations based upon provisions of the franchise which are illegal or unenforceable under the law of any State; and add an anti-waiver provision, amending 15 USC 2805 to provide that the law governing the

franchise agreement will be the law of the franchisees home state.

Finally, it is important to note that this case arises in the context of a declaratory judgment where there were no terminations or non-renewals. The PMPA preempts only where it actually "applies to a termination or non-renewal". This opinion would apparently find preemption in all contexts; a holding that is clearly wrong.

We have tried in this summary to present a brief and straight forward analysis based upon the plain language of the statute.

The conflict and diversity which this Court needs to address stem in large part from application of implied

preemption tests; and from Courts assigning different weight to different statutory goals in applying those tests.

PMPA simply sets forth uniform federal termination standards which state law cannot replace; but can be applied to. This "uniformity" is in no way disserved by application of state law to the PMPA standards.

The disservice to the law, to the industry, and to the motoring public comes when in the name of "uniformity" Courts misapply implied preemption and threaten to leave us awash in federal common law, exactly what this Court proscribed in O'Melveny & Myers, 112 L.Ed 2d @ 76.

The SSDA was the prime mover of

the 1978 Act; and would have violently opposed an ERISA type preemption that was not limited to the specific subject matter covered by the federal act.

As elegantly set forth in the dissent, and discussed in detail supra, ANY state law that regulates the content of a franchise agreement, would be preempted under the expansive reading of preemption given by the 4th Circuit, irrespective of the context of the case.

Mobil argued below, and may argue here, that some laws would escape preemption, but fails to identify such, and more importantly, fails to identify any principled distinction upon which such a finding would rest.

The majority held that a state law regulating the content of a petroleum industry franchise could not escape preemption based upon the argument that it is "the same as" the applicable provision of the PMPA, because the PMPA is silent on this issue.

Thus, under their view, any law that says anything, such as a state antitrust law that bars exclusive dealing provisions could be preempted because it is not "the same as" the applicable PMPA provision. This is clearly wrong.

For if the state law is stricken down, a vacuum occurs that can only be filled by creation of federal common law.

The problem is graphically illustrated by the facts of this case; where Virginia law is held to be null and void with respect to the franchise agreements between a Virginia corporation and Virginia dealers.

This is not a situation this vital industry can tolerate. We must know what law governs.

Again, we believe that the 1994 Amendments to the Act; which were enacted after this decision was rendered make clear that the governing law is not federal common law, rather it is the law of the franchisee's home state, and at a minimum, the case should be remanded for reconsideration in light of the 1994 Amendments.

Nevertheless, in the interest of

industry efficiency and judicial economy; the time has come - indeed it is long overdue for this Court to at last consider the Petroleum Marketing Practices Act and the scope of its preemption provision.

This is the single most watched, and most important case that has come down the "PMPA Pike".

It is so important that the SSDA was granted leave to engage and oral argument before the 4th Circuit; and we will respectfully request that the same privilege be granted from this Court.

This is truly the one PMPA case that the Court must hear.

ARGUMENT

I. BACKGROUND OF THE PMPA

During the 1970's; both Congress and state legislatures conducted extensive hearings into reports of a pattern of abuse by major oil companies of their franchise relationships with service station dealers.

Several states reacted to this pattern of abuse by enacting laws governing the entire "lifecycle" of the petroleum product franchise relationship from pre-sale disclosure, to course of dealing and course of performance, and ending with termination and non-renewal. Other state laws were more limited in that they simply regulated grounds for and notice of termination and/or nonrenewal. These laws used a variety

of termination standards, such as good cause, objective reasonableness, and subjective good faith. Several contained "laundry lists" of what constituted "good cause", and the notice provisions varied from state to state.

In enacting the PMPA in 1978, Congress took this limited approach to regulating the franchise relationship.

Other states went further by specifying what substantive provisions could be included in the franchise agreements.

In 1975 Virginia enacted legislation that not only specified grounds for and notice of termination (See VA. CODE ANN. 59.1-21:14) and substantive franchise terms (See VA.

CODE ANN. 59-1.21.15), but also mandated disclosure of certain items to prospective franchisees (See VA. CODE ANN. 59.1-21.15). However, many other states had not acted, prompting a call for federal legislation.

Oil companies such as Mobil argued that legislation regulating petroleum industry franchises was not necessary:

"Title I is allegedly designed to protect franchised dealers from bad marketing practices. The language of the bill, however, can only protect the small percentage of dealers that are failures as businessmen or unable or unwilling to provide their customers with value for services rendered. This provision would provide this type of retailer with a degree of security unknown to all other retailers and would be an invitation to abuse the franchise. As such, this bill is anti-consumer and no benefit to the 98% or so of service station dealers who ar successful and satisfied with their contractual rights. There must be literally

thousands of dealers across the country who would support that view and be willing to testify." [Hearings on HR13000 before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Power (94th Cong., 2d Sess.), Statement of Mobil Oil Corp. at p. 396] (hereinafter "House Hearings on HR 13000, supra.").

These arguments proved unavailing:

"[T]he very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline retailers that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony."

Slatky v. Amoco Oil Corp., 830 F.2d 476 at 483 (3rd Cir. en banc, 1987).

The explicitly stated purpose of the Act was to "provide for the protection of franchised distributors and retailers of motor fuel . . . and to prevent deterioration of competition in gasoline marketing." (123 Cong.Rec. 4/5/77, p. H10378,

Statement of Rep. John Dingell (the primary author of PMPA)).

As a result, the Circuits have uniformly held that the PMPA's primary purpose is protection of franchisees. This in turn requires a narrow construction of the expressly limited preemption provision.

Those courts which have broadly construed the preemption provision have usually relied on the idea that the state law is preempted because it restricted "franchisor flexibility", and thus conflicts with a goal or objective of the federal law.

This flexibility was largely unchecked prior to the passage of PMPA. The passage of the PMPA limited the flexibility of franchisors such as

Mobil. It was not the intent of Congress to allow the remaining flexibility to subvert the primary purpose of the Act, franchise protection. Id.

II. The Structure of the PMPA

The principal substantive requirement of the Act is set forth in Section 102(a): a general prohibition on termination of any franchise or nonrenewal of the franchise relationship (the ongoing business relationship, past, present and future, between the dealer and the oil company. 15 U.S.C. 2802(a)

As stated in the Senate Report: "[T]ermination is an extreme remedy. It is fundamentally punitive and not compensatory in nature." S. Rep. 95-

732, p. 18 (95th Cong., 2d Sess.), repr., U.S. Code Cong. & Ad. News 873, 876 (1978).

Section 102(b) sets out the exceptions to the general rule. 15 U.S.C. 2802(b), 2803. The Senate Report states: "EXCEPTIONS are provided in subsection (b) of 102 and in section 103." S.Rep. supra at 33, U.S. Code Cong. & Ad. News at 891 (1978).

All the PMPA does is set forth a general prohibition on all terminations or non-renewals; and then set forth affirmative defenses. The construction of the PMPA urged by Mobil would have the exceptions swallow the rule, and thus, violate the rules of statutory construction.

III. The Language and Legislative History

15 U.S.C. 2806(a) states:

"To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter." (emphasis added).

This preemption is limited in scope because the PMPA is limited in scope.

That Congress intended a limited

preemption is beyond dispute.

The Committee Reports explain: " Needed is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel franchises, and the notice which franchisors must provide franchisees prior to the termination of a franchise or non-renewal of a franchise relationship...the preemption provisions of the legislation ARE LIMITED TO state provisions of state law dealing with termination or non-renewal of franchise relationships. " Sen. Report # 95-731, reprinted in 1978 U.S. Code, Cong. & Ad. News 873.

The writ should be granted because the majority, unlike other

Courts, fails to heed these limits.

IV. EXPRESS v. IMPLIED PREEMPTION

Rules of implied preemption, such as a holding that state law may present an obstacle to Congressional goals, or that Congress has occupied a field so as to leave no room for state regulation have no place in preemption analysis under the PMPA.

"The governing federal statute may, however, restrict its own preemptive scope...When this is the case it seems quite improper for a court even to ask whether a challenged state law which clearly purports to require no such thing nonetheless "conflicts" in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget

that preemption is ultimately a matter of construing a federal statute, when that statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its own authority, and regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path." L.Tribe, American Constitutional Law , 2nd Ed 1988 @ 482 n.8.

In Cippolone v. The Liggett Group, 510 U.S.____, 112 S.Ct. 2608, the Court held that the preemptive scope of the Federal Cigarette

Labeling and Advertising Act was

"governed entirely by the express language of each Act. When Congress has considered the issue of preemption, and has included in the enacting legislation a provision explicitly addressing that issue, and when that provision provided a reliable indicium of Congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principal of expressio unius est exclusio alterius : Congress' enactment of a provision defining the pre-emptive reach of the statute implies that matters beyond that reach are not preempted." 112 S.Ct. @ 2618.

We believe that the petition should be granted in order to clarify when, if ever, implied preemption should apply.

All statutes have competing goals, and application of "conflict preemption" instead of straight forward statutory construction leads to irreconcilable

results.

The place for statutory goals is to aid in the construction of language that is not clear, not to be an ends in themselves.

With respect to the PMPA, the analysis of the First Circuit in Esso Standard Oil Company v. Dept. of Consumer Affairs, 793 F.2d 431 (1st Cir. 1985) supports the limited express preemption view.

"Indeed, the discussion in the House of Representatives prior to passage of the PMPA reflects an emphasis on protecting the rights of powerless franchisees, and it would have been contrary to that primary objective of PMPA for Congress to have desired that the bill actually reduce protection for franchisees by preempting all substantive state regulation . . . . One member of Congress made a point that the preemption of PMPA would be minimal and would `not preempt the heart' of the state statute currently in effect in his home state of Minnesota." 793 F.2d at 435.

IV. THE SCOPE OF PREEMPTION IS SET OUT CORRECTLY BY THE FIRST CIRCUIT AND OTHER COURTS

In Esso Standard, the provision at issue was a regulation of the Commonwealth of Puerto Rico which allowed a franchisee and franchisor, if unable to agree on a rent, to petition the State Department of Consumer Affairs to set a rent, which in no case could exceed ten percent (10%) of the market value of the property. 793 F.2d at 433. Franchisors claimed the regulation was preempted because PMPA allowed them to charge any rent they wanted, subject only to the good faith, normal course of business constraint, where as the regulation capped rents. 793 F.2d at 433, 434.

The question presented by the case was whether the balance struck by PMPA in the areas of termination and nonrenewal gave the franchisors a substantive right to be free of state regulation of the elements of the franchise agreement. 793 F.2d at 434. **"We do not believe it gives such protection." Id.**

The 1st Circuit, unlike the 4th, found no authority to support the proposition that the PMPA granted a franchisor a right to determine franchise provisions free of all state regulation. 793 F.2d at 435.

Respondent claimed below that the 1st and 4th Circuit rulings do not conflict relying on out of context reading of this statement:

" That is any law that would give a franchisee a cause of action to contest a termination <u>when that termination would otherwise be valid</u> under the PMPA, would be preempted by the PMPA." 793 F.2d @ 434.

The faulty assumption they make is that these terminations, based on contract provisions that are illegal or unenforceable would "otherwise be valid" under the PMPA.

If the contract of the franchise upon which termination is purportedly based is illegal or unenforceable under state law; then it does not qualify as a "provision of the franchise" under the PMPA, and the termination is not valid under PMPA. The First Circuit went on:

"In this case before us, however, a franchisor remains free to terminate or non-renew a franchise if it does not wish to accept the rent

established by DOCA." 793 F.2d @ 434 . (THIS IS PRECISELY OUR POINT - TERMINATIONS MAY GO FORWARD IF BASED UPON CONTRACT PROVISIONS THAT ARE LEGAL AND ENFORCEABLE UNDER STATE LAW). Compare, Darling v. Mobil Oil Corp. 864 F.2d 981 (2nd Cir. 1989); (state law regulating grounds for termination preempted where it prohibited termination based upon VALID franchise provision).

" The Commonwealth's rent control regulation gives neither franchisees or franchisors rights or responsibilities in the specific area of termination or non-renewal greater than those granted by the PMPA.

Rather than governing termination or nonrenewals, Regulation 2758 controls a substantive element of the franchise agreement. There is NO indication from either the language or legislative history that Congress intended to preempt all state regulation of specific components of the franchise agreement." 793 F.2d @ 435.

Mobil's argument, raised extensively in their opposition to the petition for rehearing below, that there is no conflict in the cases, is plainly wrong. The petition must be

granted to resolve this conflict.

V. The 4th Circuit Erred in Relying On the "Related To" Preemption Cases

We extensively addressed the error of applying the ERISA and ADA preemption cases in our summary; and believe that this error by the 4th Circuit is sufficient in and of itself to justify granting the writ.

VI. PMPA DOES NOT CREATE FEDERAL COMMON LAW

If Virginia law does not govern the substance of these franchise agreements; then federal common law is all that is left, because of the PMPA's silence.

As most recently held in O'Melveny and Myers v. FDIC; 512 U.S._____; 129 L.Ed.2d 67, 73, there

is no such thing as federal common law; and a concern for uniformity of law is not sufficient to create such federal common law. Id.@ 76.

The effect of the 4th Circuit ruling would be to force the creation of such a body of law, in contravention of this Courts most recent rulings.

This issue also is sufficient to justify granting the writ.

CONCLUSION

The majority opinion finds the state law preempted due to a hypothetical conflict exists between the PMPA provisions that allow for franchise termination or non-renewal under based upon "provisions of the franchise ".

The 4th Circuit majority erred in failing to recognize that the term "provisions of the franchise" must be defined by reference to the state law governing the underlying agreement. The applicable provisions of the PMPA and the state law challenged here are not only the "same as" they are one and the same, as reinforced by the 1994 Amendments.

The silence of the PMPA evidences Congressional intent to leave the matter to state law.

For if Virginia law does not govern the underlying relationship, between Fairfax, Virginia based Mobil, and Virginia dealers, what does ?

If allowed to stand, the majority opinion would require the creation of

a body of federal common law to regulate petroleum franchises. Overburdened judges and law clerks would be required to take on gasoline dealers as wards of the courts and engage in active supervision of the petroleum marketing industry pursuant to this federal common law, because as Chief Judge Ervin correctly notes any state law that affects the substance of the franchise agreements must be struck down under the 4th Circuit approach, in any context.

The panel majority would find preemption in this action for a declaratory judgment, and sweeps the Virginia laws away in all circumstances based on a hypothetical effect on possible future termination

actions. This rationale would apply to statutes such as antitrust and trade regulation laws, that are not preempted by their federal counterparts. California v. ARC America, 490 U.S. 93 (1989). Compare, Wingard v. Exxon Co. USA, 819 F.Supp 473 (D. S.C. 1993) (state law not preempted as franchisees were in full compliance and could not be subjected to termination, PMPA preempts only "to the extent" it actually applies to a termination or non-renewal).

The key question is what is the applicable law that governs the content of petroleum industry franchise agreements.

We contend it is state law. This is an issue that can only be resolved by this Court, by granting the writ.

Respectfully submitted,

Dimitri G. Daskalopoulos

DATED: Jan. 23rd , 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 1995, I served a copy of the attached Amicus Brief and Brief by mailing copies thereof, U.S. Mail, 1st Class postage prepaid to:

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Supreme Court, U.S.
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No. 94-1000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIRGINIA GASOLINE MARKETERS
& AUTOMOTIVE REPAIR ASSOCIATION, INC.,

Petitioner,

v.

MOBIL OIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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VIRGINIA GASOLINE MARKETERS &
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Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITIONER'S REPLY BRIEF

In its brief in opposition, respondent Mobil Oil Corporation ("Mobil") raises two issues for the first time and for which a response is appropriate to fully illuminate the issues for the Court.

First, Mobil asserts that the Petitioner, Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA") should have made the Court aware of recent amendments ("the PMPA Amendments") to the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq., ("PMPA").[1]

Second, Mobil asserts that this Court should decline plenary review because even if petitioner is correct with regard to the PMPA claim, the special laws issue was not addressed by either VGMARA or *Amici* in their briefs and they have failed to articulate a reason why the district court's special laws decision should be reversed. [2]

I. THE PMPA AMENDMENTS DO NOT ALTER PREEMPTION ANALYSIS IN THIS CASE.

Mobil argues that VGMARA failed to disclose to the Court the recent amendments to PMPA by Congress. While on the one hand asserting that VGMARA should have made this Court aware of the PMPA Amendments, Mobil, on the other hand, acknowledges the obvious in that the Amendments have "no effect on federal preemption as provided in the 1978 Act." *See* S. Rep. No. 103-387, 103d

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[1]Petroleum Marketing Practices Act Amendments of 1994, Pub. L. No. 103-371, 108 Stat. 3484.

[2]Mobil also makes quite an issue of the fact that the Attorney General did not join VGMARA in its Petition for Writ of Certiorari. However, as this Court well knows, and as Mobil ought to know, the Attorney General remains a party in this action as a respondent pursuant to Rule 12.

Cong., 2d Sess. 2, 5. *See also* H.R. Rep. No. 737, 103d Cong., 2d Sess. 4-5, reprinted in 1994 U.S.C.C.A.N. 2779, 2782 (under amendments States still may not "in any way regulate the grounds for termination or nonrenewal of a franchise . . .unless the State statute is exactly the same as the provisions of PMPA Title I"). [3] Since the PMPA Amendments do not affect federal preemption analysis under PMPA as originally enacted, and as applicable in this case, VGMARA had no obligation to make this Court aware of the PMPA Amendments.

II. THE FOURTH CIRCUIT ELECTED NOT TO CONSIDER THE SPECIAL LAWS ISSUE.

The Fourth Circuit elected not to consider the district court's flawed special laws ruling, basing its ruling on the established principle that "courts should refrain from addressing constitutional questions unless it is necessary to do so." *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Pet. App. A16-A17. Were this Court to review this case and reverse the decision of the Fourth Circuit on the PMPA question, the Fourth Circuit would thus be required to review and rule on the special laws decision of the district court which VGMARA believes to be significantly flawed. At oral argument, one of the

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[3] Mobil also attributes, by implication, certain statements advanced by several unnamed dealer associations regarding preemption analysis to VGMARA. VGMARA's position remains the same as reflected in its petition for writ of certiorari. VGMARA speaks for itself and not by or through certain unnamed dealer associations.

judges inquired of counsel whether the court should certify the special laws question to the Virginia Supreme Court since the special laws issue arises under the Virginia Constitution. Certainly, the Fourth Circuit has this option available to it should this case find its way back to its court.

III. THE DISTRICT COURT'S SPECIAL LAWS RULING IS FLAWED.

The district court's analysis adopted Mobil's false premise that the constraints in S.B. 235 apply to *retail outlets*, or the operators thereof, rather than the parties actually regulated by the statute, the *wholesaling franchisor-refiners*. The district court's analysis, being focused on retail outlets, found no justifiable distinction between the retail outlets benefitting from the protection of S.B. 235 and those that do not.

The district court in the instant case reasoned:

> The amendments at issue in *Fredricksburg Auto Auction v. DMV*, 242 Va. 41 (1991) applied evenly to *all* auctioneers. S.B. 235, on the other hand, affects only a small subgroup of gasoline retailers.

The district court's analysis of *Fredericksburg* was wrong for two reasons. First, not *all* sellers were regulated. The state regulated *some* sellers of cars at wholesale auction to protect buyers of used cars from fraud. The *Fredericksburg* court noted that many sellers of cars were exempted from the regulation, "i.e., rental car companies,

leasing companies, financial institutions, insurance companies, fiduciaries, and private persons disposing of vehicles for their own use." *Id.* at 45, 406 S.E.2d at 25. The fact that not all sellers were regulated did not render the classification "special." The regulation applied "withouhout distinction to all who sell motor vehicles *in the regular course of business* at wholesale auctions throughout the state." *Id.* at 49, 406 S.E.2d at 27. That distinction, between those who sell vehicles in the regular course of business and those who sell vehicles only occasionally, was reasonable because "there was no history of fraud stemming from any of the exempted businesses." *Id.* at 47, 406 S.E.2d 26.

Nothing in the Virginia Constitution requires that a regulation dealing with used car sales apply to all car sellers. Neither does anything in the Virginia Constitution require that a regulation dealing with the regulation of wholesale gasoline sales apply to each and every seller.

Second, the regulation in *Fredericksburg* applied to sellers to protect buyers. There is no suggestion that such a regulation must benefit *all* buyers. Only people who obtain a judgment against a dealer based on either fraud or a violation of the dealer licensing laws received any benefit. Yet, the district court condemned S.B. 235 because not all retail outlets benefit. There is simply no requirement that a statute apply to every member of the class benefitted by it. The requirement is that the statute apply to all members of the class *burdened* by it without distinction.

The same can be said of the case at bar. S.B. 235 regulates the franchise agreements of refiners uniformly and without discrimination. The fact that some station

operators, who do not have franchise agreements, therefore do not benefit from S.B. 235 is of no more consequence than the fact that some buyers of cars, who don't have a judgment against a dealer get no benefit from the regulation involved in *Fredericksburg*. If the *Fredericksburg* court had applied the district court's logic, the regulation would be declared unconstitutional simply because not all buyers of cars were affected by the regulation - only the buyers of cars who obtained a judgment against a dealer.

Thus, under a proper special laws analysis the issue is whether the regulation is imposed on an arbitrarily chosen class, not whether the benefits of the regulation are uniformly distributed among the member of the protected class. It is *the classification* that must be "reasonable and not arbitrary" and apply "to all persons belonging to the class without distinction." *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 102, 376 S.E.2d 525, 533 (1989).

Similarly, the district court erred in its application of *Benderson Development Co. v. Sciortino*, 236 Va. 136, 372 S.E.2d 751 (1988). There, the court found certain Sunday closing laws unconstitutional because there was no justification for their disparate application to similarly situated businesses in Virginia. The closing laws covered only 20% of the businesses in the state.

Again, the district court's error in the present case is manifest. The retail outlets are the *customers* of the class of trade that is regulated -- *not the businesses subject to regulation*. Accordingly, the fact that there is a minority of similarly situated retailers who are *customers* of the regulated class is immaterial to special laws analysis. The regulation applies uniformly to the entire class regulated

and *the regulated class* represents a reasonable classification. The classification need only apply "to all of the persons *belonging to the class* without distinction." *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 102, 376 S.E.2d 525, 533 (1989).

Mobil correctly argued below that the universe of "gas stations" (retailers) is comprised of a variety of segments. For clarification, firms operating at a retail (gas station) level in the petroleum industry may be functionally classified by three criteria: (1) the degree of vertical integration of the operators, (contrast the single station dealer with the refiner operated retail outlet); (2) the industry classification of the supplier of the petroleum products they retail, (contrast a distributor supplied retailer with a refiner supplied retailer); and (3) who controls the real estate the retailer occupies, (contrast a dealer owned retail outlet with an outlet where the dealer is an oil company tenant).

These classification criteria combine to create a spectrum of retailers. At the most independent end of the spectrum would be the retailer who owns his own location and purchases gasoline from one or more independent distributor(s) engaged in price competition in the wholesale market for his business. At the least independent end of the spectrum is the retailer buying gasoline exclusively from one major oil company at wholesale prices unilaterally established by the refiner with no wholesale competition and operating on real estate controlled by the supplying oil

company.[4] The prohibitions of S.B. 235 support the competitive independence of these least independent retailers by limiting the amount of control the refiners can impose on them.

To safeguard the limited independence and competitive viability of these least independent refiner-controlled retailers facing competition (1) from more independent retailers and (2) from their own refiner-suppliers trading at retail, the general assembly correctly imposed the constraints of S.B. 235 *on all refiners engaged in wholesaling to franchised retailers.*

Respectfully submitted,

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[4] In a category by themselves are retail outlets owned, supplied, and operated by the major oil companies through employees. In support of its "special legislation" argument, Mobil argued below that the constraints of S.B. 235 do not apply to contractually constrain Mobil as to the retail outlets it operates itself with its own employees. There is no one to contract with at these locations because Mobil is the operator. Mobil already has unlimited control over its company run retail locations. This is an "apples to oranges" comparison.

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